TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 408.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. DOANE, AND F. R. COUDERT, RECEIVERS OF THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFFS IN ERROR,

vs.

THE CITY OF KANSAS CITY, KANSAS, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED SEPTEMBER 18, 1896.

(16,987.)

(16,987.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 402.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. DOANE, AND F. R. COUDERT, RECEIVERS OF THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFFS IN ERROR,

vs.

THE CITY OF KANSAS CITY, KANSAS, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 3, 1898.

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1 In the Supreme Court of the State of Kansas.

Be it remembered that on the 5th day of March, 1896, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition in error, with a case-made of the proceedings of the district court attached thereto and made a part thereof, and a precipe for summons in error against S. H. H. Clark *et al.*, receivers of the Union Pacific Railway Company, defendants in error, which are in words and figures as follows, to wit:

2 In the Supreme Court of the State of Kansas.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF EDUCATION of the City of Kansas City, Kansas; The Township of Wyandotte, of Wyandotte County, Kansas; School District No. 9, Wyandotte County, Kansas; Benjamin Schnerlie, as County Treasurer of Wyandotte County, Kansas; Leonard C. Daniels, as Successor in Office of Charles E. Bruce and as County Clerk of Wyandotte County, Kansas, Plaintiffs in Error,

vs.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Defendants in Error.

Petition in Error.

The said City of Kansas City, Kansas; The Board of Education of the City of Kansas City, Kansas; The Township of Wyandotte, of Wyandotte county, Kansas, and School District No. 9 of Wyandotte County, Kansas, plaintiffs in error above named, are each and all municipal corporations duly organized, existing, and acting as such under the laws of the State of Kansas.

That the plaintiff in error Benjamin Schnerlie, as county treasurer of Wyandotte county, Kansas, is and was at all times herein mentioned county treasurer of said Wyandotte county.

That Leonard C. Daniels, plaintiff in error above named, is now the regularly elected, qualified, and acting county clerk of Wyandotte county, Kansas, and is the successor in office of Charles E. Bruce, in this petition hereinafter mentioned.

That the defendants S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert are now the regularly appointed and acting and qualified receivers of the Union Pacific Railway Company, a railway corporation organized, existing, and doing business as such under the laws of the United States.

The plaintiffs in error in the above-entitled action complain of the defendants in error in above action for that the said defendants in error above named, as receivers of the Union Pacific Railway Company, at the May term, 1895, of the court of common pleas of Wyandotte county, State of Kansas, recovered a judgment
3 by the consideration of said court against the City of Kansas City, Kansas; The Board of Education of the City of Kansas

City, Kansas; The Township of Wyandotte, of Wyandotte county, Kansas; School District Number Nine (9) of Wyandotte County, Kansas; Benjamin Schnerlie, as county treasurer of Wyandotte county, Kansas, and Charles E. Bruce, as county clerk of Wyandotte county, Kansas, and against the successors in office of said Charles E. Bruce and said Benjamin Schnerlie in a certain action pending in said court, wherein the said defendants in error, as receivers of the said Union Pacific Railway Company, were plaintiffs and the said City of Kansas City, Kansas; The Board of Education of the City of Kansas City, Kansas; The Township of Wyandotte, of Wyandotte county, Kansas; School District Number Nine (9) of Wyandotte county, Kansas; Benjamin Schnerlie, as county treasurer of Wyandotte county, Kansas; Charles E. Bruce, as county clerk of Wyandotte county, Kansas, were defendants.

That a full, complete, true, correct, and certified transcript of the record of said court of common pleas in said action is hereto attached, marked "Exhibit A," and made a part of this petition in error, and the said plaintiffs in error herein aver that there is error in said record and proceedings in this, to wit:

1st. That said court of common pleas erred in its finding, decision, and judgment that chapter 74 of the Session Laws of Kansas for the Year of 1891, entitled "An act relating to cities of the first class, and adding thereto certain adjoining territory," is unconstitutional, null, and void.

2nd. That said court erred in overruling plaintiffs' demurrer to the defendants' petition in said actions.

3rd. That said court erred in not rendering judgment for the plaintiffs in error and by rendering judgment for the defendants in error on the pleadings in said action.

Wherefore the plaintiffs in error above named pray that said judgment so rendered shall be reversed, set aside, and held
4 for naught, and that a judgment may be ordered to be rendered in favor of the plaintiffs in error and against the defendants in error, and that the plaintiffs in error be restored to all rights lost by the rendition of such judgment, and for such further relief as — the court may seem just.

K. P. SNYDER,
City Counselor of Kansas City, Kansas,
T. A. POLLOCK,
City Attorney of Kansas City, Kansas,
S. C. MILLER,
County Attorney of Wyandotte County, Kansas,
Attorneys for the Plaintiffs in Error.

Filed Mar. 5th, 1896.

C. J. BROWN,
Clerk Sup. Court.

To C. J. Brown, clerk of supreme court of the State of Kansas:

You will please issue summons in error in the above-entitled case for defendants in error, S. H. H. Clark, Oliver W. Mink, E. Ellery

Anderson, J. W. Doane, and F. R. Coudert, as receiver of the Union Pacific Railway Company, and their attorneys of record, A. L. Williams, N. H. Loomis, and R. W. Blair, to sheriff of Shawnee county, Kansas, returnable according to law.

March 5th, 1896.

K. P. SNYDER,
Attorney for Plaintiffs in Error.

(Endorsed:) 10571. City of Kansas City *et al.*, plaintiffs in error, *vs.* S. H. H. Clark *et al.*, as receivers of the Union Pacific Railway Company, defendants in error. Petition in error & transcript. K. P. Snyder, T. A. Pollock, S. C. Miller. Filed Mar. 5, 1896. C. J. Brown, clerk supreme court.

5 10571.

In the Court of Common Pleas of Wyandotte County, Kansas.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. DOANE, and F. R. COUDERT, as Receivers of the Union Pacific Railway Company, Plaintiffs,

vs.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF Education of the City of Kansas City, Kansas; M. G. McLean, as County Treasurer of Wyandotte County, Kansas; Charles E. Bruce, as County Clerk of Wyandotte County, Kansas; The Township of Wyandotte, of Wyandotte County, Kansas, and School District Number Nine of Wyandotte County, Kansas, Defendants. } No. 1647.

Before the Hon. Thomas P. Anderson, judge of said court.

Transcript of Record.

Appearances.—For plaintiffs: A. L. Williams, N. H. Loomis, R. W. Blair. For defendants: K. P. Snyder, T. A. Pollock.

Filed Mar. 5, 1896.

C. J. BROWN,
Clerk Sup. Court.

EXHIBIT "A."

6 In the Court of Common Pleas of Wyandotte County, Kansas.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Plaintiffs,
vs.
THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF Education of the City of Kansas City, Kansas; M. G. McLean, as County Treasurer of Wyandotte County, Kansas; Charles E. Bruce, as County Clerk of Wyandotte County, Kansas; The Township of Wyandotte, of Wyandotte County, Kansas, and School District Number Nine of Wyandotte County, Kansas, Defendants. } No. 1647.

Before the Hon. Thomas P. Anderson, judge of said court.

Appearances.—For plaintiffs: A. L. Williams, N. H. Loomis, R. W. Blair; for defendants: K. P. Snyder, T. A. Pollock.

Transcript of Record.

EXHIBIT "A."

7 Be it remembered that on the 15th day of December, A. D. 1893, the plaintiffs filed with the clerk of said court their petition herein, a copy of which petition being in words and figures as follows:

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANderson, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Plaintiffs,
vs.
THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF Education of the City of Kansas City, Kansas; M. G. McLean, as County Treasurer of Wyandotte County, Kansas; Charles E. Bruce, as County Clerk of Wyandotte County, Kansas; The Township of Wyandotte, of Wyandotte County, Kansas, and School District Number Nine (9) of Wyandotte County, Kansas, Defendants. } No. 1647.

Petition.

The plaintiffs for their cause of action allege that on the 13th day of October, 1893, plaintiffs above named, S. H. H. Clark, Oliver W. Mink, and E. Ellery Anderson, were by the United States circuit court for the district of Nebraska appointed receivers of all of the property of the Union Pacific Railway Company; that afterwards, on the 13th day of October, 1893, they were by the United States circuit court for the district of Kansas appointed ancillary receivers of the

property of the Union Pacific Railway Company and given entire charge, custody, and control of all of the property of said company within the State of Kansas; that afterwards, on the — day of November, 1893, plaintiffs J. W. Doane and F. E. Coudert were by the United States circuit court for the district of Nebraska appointed as additional receivers of all of the property of the Union Pacific Railway Company; that afterwards, on the 27th day of November, 1893, they were by the United States circuit court for the district of Kansas duly appointed as ancillary receivers of the property of said company, and that said plaintiffs above named have since said dates had full charge, custody, and control of all of the property of all kinds and description of the Union Pacific Railway Company, and that under the order of appointment as receivers they are now engaged in operating the railroad of the Union Pacific Railway Company, and that under such order of appointment they are authorized to and it is the duty of plaintiffs to pay all legal taxes against the property of the Union Pacific Railway Company and to institute and prosecute all such suits as may be necessary for the proper protection of the property and trusts vested in them as receivers.

Plaintiffs further allege that said The Union Pacific Railway Company is a corporation duly organized in accordance to law and is the owner of a line of railroad and other property located in Wyandotte county, Kansas.

That the said city of Kansas City, Kansas, is a city of the first class, organized and existing under and by virtue of the laws of the State of Kansas.

Plaintiffs further allege that on the 8th day of March, 1892, the said defendants, The City of Kansas City, by a certain ordinance enacted by it upon that date attempted to include within its boundaries and to bring within its jurisdiction certain unplatted lands lying adjacent thereto and described as follows:

Commencing at the northeast corner of the southeast quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25) east, in Wyandotte county, Kansas, thence south forty (40) poles; thence east to the Kansas river; thence down the same to the prolongation of the east and west center line of said section fifteen (15); thence west to beginning.

8 Also commencing at the northeast corner of the southeast quarter (¼) of section fifteen (15), township eleven (11), range 25 east, in Wyandotte county, Kansas, thence west to the center line of said section fifteen (15); thence north eighty (80) poles; thence west fifty-four (54) poles; thence south to the southerly line of Fifth street, in the original town site of Armstrong; thence along the southerly line of Fifth street to its intersection with the southerly line of the Muncie boulevard; thence westerly along the southerly line of the Muncie boulevard to the west line of said section fifteen (15); thence south to the southwest corner of the southwest quarter of section fifteen (15); thence east eighty (80) poles; thence north fifty-two (52) poles; thence east eighty-five (85) poles; thence north twenty-eight (28) poles; thence east eight (8) poles; thence north one hundred ninety-nine (199) feet; thence east three hun-

dred fifty-five eight-tenths (355.8) feet to the east line of Third street, in McAlpine's addition; thence north one hundred sixty feet (160 feet); thence east two hundred seventy-five feet (275 feet) to the center line of Second street, in McAlpine's addition, produced; thence north one hundred thirty (130) feet; thence east three hundred fifteen (315) feet to the prolongation of the center line of First street, in McAlpine's addition; thence north one hundred thirty-two feet and eight-tenths feet (132.8); thence east to the east line of said section fifteen (15); thence north forty (40) poles to the beginning.

Also commencing at a point where the northerly line of the Union Pacific Railway Company's right of way intersects the east line of *of* section sixteen (16), township eleven (11), range twenty-five east (25), in Wyandotte county, Kansas, thence northwesterly along said northerly line of the right of way of the Union Pacific railway to the west line of said section sixteen (16); thence south along the west line of said section sixteen (16) about one hundred feet (100) to the southerly line of the right of way of the Union Pacific railway; thence southeasterly along the southerly line of said right of way to the east line of said section sixteen (16); thence north about one hundred (100) feet to beginning.

Plaintiffs further allege that said Union Pacific Railway Company was at that time and now is the owner of the lands intended to be described in said ordinance, with the exception of a small portion thereof, consisting of about eight or ten acres, belonging to the Chicago, Rock Island and Pacific Railroad Company. A copy of the ordinance above referred to is attached to this petition, marked "Exhibit A," and made a part hereof.

Plaintiffs allege that said city of Kansas City passed said ordinance and attempted to take said lands within its limits under and by virtue of the provisions of chapter seventy-four (74) of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class and the adding thereto certain adjoining territory."

And plaintiffs are advised, and so charge the fact to be, that in so far as said statute attempts to authorize the taking of said lands within the limits of Kansas City, Kansas, as attempted in said ordinance, Exhibit "A," it is unconstitutional, null, and void, in this, to wit:

That by reason of that portion of the act which excepts from its operation any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation, it is in violation of that part of the fourteenth amendment to the Constitution of the United States which reads as follows: "Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction *of* the equal protection of the law;" and, furthermore, that by reason of said exception *and by reason of said exception* and by reason of the facts set forth in this petition said act is in violation of section one of article twelve and of section seventeen of article two of the constitution of the State of Kansas.

Plaintiffs are further advised, and so charge the fact to be, that

said city of Kansas City was without authority of law to include within its boundaries the land above described, as attempted
9 by it; that the action of said city in so doing was null and void, and that said land is not and never has been within the limits of said city.

Plaintiffs further allege upon information and belief that there was not, at the time of the passage of said chapter seventy-four (74) of the Session Laws of Kansas for 1891, any city of thirty thousand inhabitants or more in the State of Kansas where the conditions referred to in the first part of said act, permitting the adding of additional territory to a city by the passage of an ordinance merely, exist; and plaintiffs are advised, and so charge the fact to be, that said act of the legislature, while purporting to be a general act, was intended to apply solely to the lands attempted to be taken within the limits of said Kansas City, Kansas, by said ordinance, "Exhibit A."

Plaintiffs further allege that no notice, either personal or by publication or otherwise, was ever given to said railway company of the intention of said city to enact the ordinance in question or to take the territory in question into the said city, and that said railway company had no opportunity to be heard before the council of said city upon the subject-matter of said ordinance or to protest against the passage of said ordinance.

Plaintiffs further allege that the lands so attempted to be taken within the boundaries of said city, as aforesaid, and owned by the said Union Pacific Railway Company, except that portion thereof used for railroad purposes and assessed by the State board of railroad assessors, appear upon the tax-rolls of said county of Wyandotte, now in the hands of the county treasurer thereof, under the following descriptions, and are assessed for the year of 1893 at the following values, which valuations appear upon said tax-rolls:

Description No. 1.—All that portion of the east thirty (30) acres of the northwest quarter of section fifteen (15), township eleven (11), range twenty-five (25), being seventeen and twenty one-hundredths acres (17.20), lying west of and adjacent to county road (Fifth street) running through said tract of land from north to south; valuation, eleven thousand four hundred sixty-five ($11,465.00) dollars.

Description No. 4.—Commencing at a point seven hundred fifty-three feet (753) north of the southeast corner of the southwest quarter of the southwest quarter of section fifteen (15), township eleven (11), range twenty-five (25), said point being fifty feet north of center line of Kansas City and Topeka railway; thence west fifty (50) feet from and parallel to said center line of said railway to west line of said section fifteen (15), township 11, range 25; thence north along west line of said section 15 to a point fifty (50) feet south of center line of most southerly track of Union Pacific Railway Company, measured at right angles thereto; thence easterly fifty (50) feet from and parallel to said center line of said track to east line of southwest quarter of southwest quarter of section fifteen (15), township eleven (11), range twenty-five (25); thence south on said west line

to beginning, being three and eighty-five-hundredths acres (3.85); valuation, three thousand five hundred thirty ($3,530.00) dollars.

Description No. 5.—Commencing at a point which is three hundred seventy and fifty-two one-hundredths (370.52) feet north and thirty-five (35) feet west from southeast corner of southwest quarter of southwest quarter of section fifteen (15), township eleven (11), range twenty-five (25); thence westerly three hundred thirty-two and forty-eight-hundredths (332.48) feet south from and parallel to center line of main track of Kansas City and Topeka railway to west line of section fifteen (15), township eleven (11), range twenty-five (25); thence south on said west line of said section fifteen (15), township eleven (11), range twenty-five (25), to southwest corner thereof; thence east on south line of section 15, township eleven (11), range twenty-five (25), thirteen hundred and five and four-tenths (1,305.4) feet to a point thirty-five feet (35) west from the southeast corner of southwest quarter (¼) of southwest quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25); thence north three hundred seventy and fifty-two hundredths (370.52) feet to beginning, being thirteen and eighty-five-hundredths (13.85) acres; valuation, nine thousand two hundred fifty dollars ($9,250.00).

Description No. 6.—Commencing at a point fifty (50) feet south of center track of Union Pacific railway, measured at right angles thereto, which point is eight (8) poles east and forty (40) poles south of northeast corner of southwest quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25), thence westerly fifty (50) feet south and parallel to said center line of track to east line of county road running through said tract of land from north to south; thence southerly along east line of said county road to east line of southwest quarter (¼) of southwest quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25); thence south on said east line to a point fifty-two (52) poles north of southeast corner of southwest quarter (¼) of southwest quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25); thence north on said line twenty-eight (28) poles; thence east eight (8) poles; thence north forty (40) poles to beginning, excepting right of way one hundred (100) feet wide, fifty (50) feet on each side of center line of Union Pacific Railway tracks, as located through said lands, being twenty-five (25) acres; valuation, twenty-two thousand five hundred dollars ($22,500.00).

Description No. 7.—Commencing at a point six hundred fifty-nine and six-tenths (659.6) feet south of a point on north line of southeast quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25), and one hundred thirty-two (132) feet east of center of said section, thence south six hundred twenty-one and nine-tenths (621.9) feet, west one hundred thirty-two (132) feet, south two hundred fifty-two (252) feet, east one hundred eighty-two (182) feet to southwest corner of lot one (1), block one (1), McAlpine's addition to Armourdale; thence north along west line of said lot one (1), block one (1), one hundred seventy-five (175) feet to southwest corner of lot one (1), block two (2), in said addition; thence east along south line of

said block two (2) to the southeast corner of lot ten (10) thereof; thence north along east line of said lot ten (10) — southeast corner of lot eleven, block two (2); thence east along south line of north half (½) of block five (5) to southeast corner of lot eleven (11), block five (5), said addition; thence north along east line of said lot eleven (11) to southeast corner of lot ten (10), block four (4); thence east along south line of blocks nine (9) and ten (10), prolonged, to west line of lands owned by Swift Packing Company; thence north along said west line three hundred ninety-two and eight-tenths (392.8) — to the Union Pacific Railway Company's lands; thence west along south line of said railway company's lands fifteen hundred eighty-four and seventy-five-hundredths (1,584.75) feet to beginning, excepting right of way one hundred (100) feet wide, fifty (50) feet on each side of center line of Union Pacific tracks, as located through said land, twelve and five-hundredths (12.05) acres; valuation, twelve thousand and fifty dollars ($12,050.00).

Description No. 8.—Commencing eight (8) poles east of the northwest corner of southeast quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25), thence south forty (40) poles; thence east to a point fifty (50) feet west from center line of Armourdale spur to the east and west center line of section fifteen (15), township eleven (11), range twenty-five (25); thence west on said line of said section to beginning, excepting right of way one hundred (10–) feet wide, fifty (50) feet on each side of center line of Union Pacific tracks, as located through said land, being seventeen and fifty-hundredths (17.50) acres; valuation, seventeen thousand five hundred dollars ($17,500.00).

11 Description No. 9.—Commencing at intersection of east and west center line of section fifteen (15), township eleven (11), range twenty-five (25), with west bank of Kansas river, thence west along said center line of section fifteen (15), township eleven (11), range twenty-five (25), to a distance of seven hundred thirty-seven (737) feet, more or less, to a point fifty (50) feet from the center of the Armourdale spur of the Union Pacific railway, southerly fifty (50) feet from and parallel to center line of said Armourdale spur, a distance of six hundred eighty-two (682) feet, more or less, to north line of lands owned by Kansas City Stock Yards Company; thence east along said north line of lands owned by Kansas City Stock Yards Company to west bank of Kansas river; thence northerly along west bank of Kansas river to place of beginning, eleven and sixty-three-hundredths (11.63) acres; valuation, six thousand nine hundred and sixty dollars ($6,960.00).

Plaintiffs further allege that the balance of said lands belonging to said Union Pacific Railway Company and included within those attempted to be taken into said city of Kansas City by said ordinance, "Exhibit A," are used for railroad purposes and assessed by the State board of railroad assessors; that said lands, with other lands located in Wyandotte township, in said county, and used for railroad purposes, appear upon the tax-rolls of Wyandotte county for the year 1893 at the following values, which valuations appear upon said tax-rolls:

Road-bed, Right of Way, and Other Property Assessed and Returned by State Board of Assessors.

Main track, 11.75 miles, at $12,042.72 per mile	$141,502
Side track, 26.42 miles, at $2,500.00 per mile	66,050
Buildings and improvements	26,060
Total	$233,612

Plaintiffs further allege that that part of said lands used for railway purposes and assessed by the State board of railroad assessors which are included within said ordinance, "Exhibit A," would, if divided from the balance of the right of way located in Wyandotte township and correctly apportioned, appear upon the tax-rolls of said county for the year of 1893 under the following descriptions and at the following valuations:

Road-bed, Right of Way, and Other Property Assessed and Returned by the State Board of Railroad Assessors.

Main track, 1.71 miles, at $12.042.72 per mile	$20,593.00
Side track, 25.75 miles, at $2,500.00 per mile	64,375.00
Buildings and improvements	26,000.00
Total	$110,968.00

Plaintiffs further allege that such portions of said land owned by the Union Pacific Railway Company not actually used for railroad purposes are vacant and unoccupied lands, which are held and possessed by said railroad company for railroad purposes.

Plaintiffs further allege that the said city of Kansas City, Kansas, has levied and certified to the county clerk of said county of Wyandotte a tax of twenty-nine and six-tenths (29 6) mills on the dollar against all taxable property located in said city for the year 1893, and that said tax has been extended and charged by the county clerk upon the tax-rolls of the said county against the above-described property of said Union Pacific Railway Company, making the amount of taxes levied against each of said pieces of property by the said city of Kansas City for the year 1893 as follows, to wit:

12

Description No. 1.—Valuation	$11,465.00	Tax	$350.83
Description No. 4.—Valuation	3,530.00	Tax	104.49
Description No. 5.—Valuation	9,250.00	Tax	273.80
Description No. 6.—Valuation	22,500.00	Tax	666.00
Description No. 7.—Valuation	12,050.00	Tax	356.68
Description No. 8.—Valuation	17,500.00	Tax	518.00
Description No. 9.—Valuation	6,960.00	Tax	206.02
Total			$2,475.82

And in the aggregate the sum of two thousand four hundred seventy-five dollars and eighty-two cents ($2,475.82) taxes levied by the said city of Kansas City against said property for the year 1893.

Plaintiffs further allege that said defendant, The Board of Education of Kansas City, has levied and certified to the county clerk of said county a tax of eleven and one-tenth (11.1) mills on the dollar against all taxable property located within the boundaries of said city for the year 1893, and that the said tax has been extended and charged by the county clerk of said county upon the tax-rolls of said county against the above-described property of said Union Pacific Railway Company, making the amount of taxes levied against each of said pieces of property by said board of education for the year of 1893 as follows, to wit:

Description No. 1.—Valuation....	$11,465.00	Tax....	127.26
Description No. 4.—Valuation....	3,530.00	Tax....	39.18
Description No. 5.—Valuation....	9,250.00	Tax....	102.68
Description No. 6.—Valuation....	22,500.00	Tax....	240.75
Description No. 7.—Valuation....	12,050.00	Tax....	133.76
Description No. 8.—Valuation....	17,500.00	Tax....	194.25
Description No. 9.—Valuation....	6,960.00	Tax....	77.25
Total....			$924.13

And in the aggregate the sum of nine hundred twenty-four dollars and thirteen cents ($924.13) taxes levied by said board of education against said property for the year 1893.

Plaintiffs further allege that said defendant, Township of Wyandotte, has levied and certified to the county clerk of said county of Wyandotte a tax of nine mills (.009) on the dollar against all the taxable property located in said township for the year 1893, and that said tax has been extended and charged by the county clerk of said county upon the tax-rolls of said county against all that portion of the property of said Union Pacific Railway Company attempted to be taken within the limits of said Kansas City by said ordinance, "Exhibit A," which is used for railway purposes, together with other right of way belonging to said railway company located within said Wyandotte township, making the total amount of taxes levied by said township against all of said property used for right-of-way purposes as follows, to wit, the sum of two thousand one hundred two dollars and forty-four cents ($2,102.44).

Plaintiffs further allege that the tax levied by said township would, if extended against that portion of said property used for railroad purposes and included within said ordinance, "Exhibit A," amount to nine hundred ninety-eight dollars and seventy-one cents ($998.71).

Plaintiffs further allege that said defendant, School District Number Nine (9), has levied and certified to the county clerk of said Wyandotte county a tax of five (.005) mills on the dollar against all the taxable property located in said school district for the year 1893, and that said tax has been extended and charged by the county

clerk of said county upon the tax-rolls of said county against
13 all that portion of the property of said Union Pacific Railway Company attempted to be taken within the limits of said Kansas City by said ordinance, "Exhibit A," which is used for railroad purposes, together with the other right of way belonging to said company located within said School District Number Nine (9), making the total amount of taxes levied by said school district against all of said property used for right-of-way purposes as follows, to wit, the sum of six hundred eighty-six dollars and ten cents ($686.10).

Plaintiffs further allege that the tax levied by the said school district would, if extended and charged against that portion of said property used for railway purposes and included in the said ordinance, "Exhibit A," amount to five hundred fifty-four dollars and eighty-four cents ($554.84).

Plaintiffs further allege that said defendant-, City of Kansas City and Board of Education of Kansas City, claimed jurisdiction over all the land described in said ordinance, "Exhibit A," including that used for railroad purposes, and claim that its levies should have been extended and charged against all of said property, and further claim that the levies of said Wyandotte township and school district number nine (9) should not have been extended and charged against any portion thereof.

Plaintiffs further allege that said township of Wyandotte and said school district number nine claim that none of said lands described in said ordinance, "Exhibit A," were legally taken into the limits of Kansas City, and that the same remain within the jurisdiction of said Wyandotte township and said school district, and that its levy should have been extended against all of the lands included in said ordinance, "Exhibit A," and that the levies of said Kansas City and the board of education of Kansas City should not have been extended and charged against any portion thereof.

Plaintiffs allege that they have been advised, and accordingly allege, that the contention of said township and school district is correct. Plaintiffs say, however, that they stand ready and willing to pay the taxes assessed against all of said property as soon as it has been finally determined which taxes are properly a lien thereon.

Plaintiffs further allege that said M. G. McLean, county treasurer of said county, now has possession of said tax-rolls of Wyandotte county for the year 1893 and proposes to and will collect the amounts of said city and school taxes levied against said property as aforesaid, and that said county clerk will continue from year to year to extend the levies of said Kansas City and said board of education of Kansas City against said property of the Union Pacific Railway Company, unless prevented by the injunction of some court of competent jurisdiction from doing so.

Wherefore, as plaintiffs are remediless at common law, they pray this court to issue an injunction against said M. G. McLean, as county treasurer of said county, and against his deputy, assistants, and successors in office, forever enjoining them from collecting the

amount of said city and said school taxes levied and charged against said property for the year 1893, as aforesaid, amounting in the aggregate to the sum of three thousand three hundred and ninety-nine dollars and ninety-five cents ($3,399.95), and against the said Charles E. Brace, as county clerk of said county, his deputies, assistants, and successors in office, forever enjoining them from extending any further levies of the said city of Kansas City and of the board of education of Kansas City against the above-described property of said Union Pacific Railway Company, and that they may be temporarily enjoined from so doing until the final hearing of this cause.

14 Plaintiffs further pray that in the event of its being finally determined in this case that said lands included in said "Exhibit A" are a part of Kansas City, under and by virtue thereof, that the said county treasurer be forever enjoined from collecting the taxes levied and charged against that portion of said property included in said ordinance, "Exhibit A," which are used for railroad purposes and which appear upon said tax-rolls in favor of said township *at* Wyandotte and school district number nine (9), and that said county clerk be forever enjoined from extending said township and school district levies against said property last above mentioned, and to the end that the rights of all parties concerned may be properly protected during this litigation, plaintiffs pray for a temporary injunction against said county treasurer restraining him from collecting the amount of said township and school taxes until the final termination of this case.

Plaintiffs pray for such other and further or different relief as in equity and good conscience they may be entitled to.

A. L. WILLIAMS,
N. H. LOOMIS, AND
R. W. BLAIR,
Attorneys for Plaintiffs.

STATE OF KANSAS, } ss:
Wyandotte County, }

A. W. Scribner, being first duly sworn, says that he is the tax commissioner for the plaintiffs; that as such tax commissioner he has charge of the payments of the taxes levied against the property of said Union Pacific Railway Company; that said plaintiffs cannot personally verify this petition for the reason that they are not within the State of Kansas, and furthermore because they are not sufficiently familiar with the facts in this case to make such verification.

Affiant further states that he has read the foregoing petition and knows the contents thereof, and that the allegations of fact therein contained are true.

A. W. SCRIBNER.

Subscribed and sworn to before me this 15th day of December, 1893.

[SEAL.] A. L. BERGER,
Notary Public.

My commission expires January 23rd, 1895.

Præcipe.

To the clerk of said court:

Please issue summons in the above-entitled cause directed to the sheriff of Wyandotte county, Kansas, and made returnable according to law; suit brought to restrain collection of taxes and other relief.

A. L. WILLIAMS,
N. H. LOOMIS, AND
R. W. BLAIR,
Attorneys for Plaintiffs.

15 EXHIBIT "A."

Ordinance No. 2163.

An ordinance adding certain lands therein described known as the Union Pacific lands to and making the same a part of the city of Kansas City, Kansas.

Whereas, a certain unplatted territory belonging to the Union Pacific Railroad Company lies upon and mainly within the city of Kansas City, Kansas, and is so situated as to be bounded on three-fourths (¾) of its boundary line by platted territory of, and adjoining to said city; which said railroad land, by virtue of its location, enjoys the benefits of said city without sharing its burdens, now therefore,

Be it ordained by the mayor and councilmen of the city of Kansas City, Kansas:

SECTION 1. That the following-described territory, to wit: Commencing at the northeast corner of the southwest quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25) east, in Wyandotte county, Kansas, thence south forty (40) poles, thence east to the Kansas river, thence down the same to the prolongation of the east and west center line of said section fifteen (15) thence west to beginning.

Also commencing at the northeast corner of the southeast quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25) east, in Wyandotte county, Kansas, thence west to the center line of said section fifteen, thence north eighty (80) poles, thence west fifty-seven (57) poles, thence south to the southerly line of Fifth street in the original town site of Armstrong, thence along the southerly line of Fifth street to its intersection with the southerly line of the Muncie boulevard, thence westerly along the southerly line of the Muncie boulevard to the west line of said section fifteen (15), thence south to the southwest corner of the southwest quarter (¼) of section fifteen (15), thence east eighty (80) poles, thence north fifty-two (52) poles, thence east eighty-five (85) poles, thence north twenty-eight (28) poles, thence east eight (8) poles, thence north one hundred ninety-nine (199) feet, thence east three hundred fifty-five and eight-tenths (355.8) feet to the east line of Third street, in McAlpine's addition, thence north one hundred sixty (160)

feet, thence east two hundred seventy-five (275) feet to the center line of Second street in McAlpine's addition, produced, thence north one hundred thirty (130) feet, thence east three hundred fifteen (315) feet to the prolongation of the center line of First street in McAlpine's addition, thence north one hundred thirty-two and eight-tenths (132.8) feet, thence east to the east line of section fifteen (15), thence north forty (40) poles to the beginning.

Also commencing at a point where the northerly line of the Union Pacific Railway Company's right of way intersects the east line of section sixteen (16) township eleven (11) range twenty-five (25) east, in Wyandotte county, Kansas, thence northwesterly along said northerly line of the right of way of the Union Pacific railway, thence southeasterly along the southerly line of said right of way, to the east line of said section sixteen (16), thence north about one hundred (100) feet to the beginning.

Said tracts being contiguous and containing in the aggregate one hundred seventy-two (172) acres, and hereby *is* added to and made a part of the city of Kansas City, Kansas.

SECTION 2. This ordinance shall take effect and be in force
16 from and after its passage and publication in the Kansas City Gazette.

Passed in council March 8th, 1892.

WILLIAM ALBRIGHT, *City Clerk.*

Approved March 11th, 1893.

THOMAS F. HANNAN, *Mayor.*

Published March 11th, 1892.

Endorsed: No. 1647. S. H. H. Clark *et al.*, as receivers of the Union Pacific Railway Company, plaintiffs, *vs.* The City of Kansas City, Kansas, *et al.*, defendants. Petition and precipe. Filed December 15th, 1893. S. C. McGonigal, clerk, by F. L. Kenny, deputy.

17 In the Court of Common Pleas of Wyandotte County, Kansas.

S. H. CLARK ET AL., as Receivers of the Union Pacific Railway Company, Plaintiffs,
vs.
THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF Education of Kansas City, Kansas; M. G. McLean, as Treasurer of Wyandotte County, Kansas; The Township of Wyandotte, of Wyandotte County, Kansas, and School District No. Nine (9) of Wyandotte County, Kansas, Defendants. } No. 1647.

Order.

Upon this 15th day of December, 1893, comes the plaintiffs above named, by N. H. Loomis, their attorney, and present to the court their petition in the above-entitled cause, duly verified, wherein they pray for a temporary injunction against the said M. G. McLean, as county treasurer of Wyandotte county, Kansas, restraining him

from collecting certain taxes therein mentioned, upon due consideration whereof it is by the court ordered that the hearing upon said application for a temporary injunction be set for January 8th, 1894, at 10 o'clock a. m., or as soon thereafter as the attention of the court may be had. In the meantime and until further order of the court, it is hereby ordered that the said M. G. McLean, as county treasurer, his deputies, assistants, and successors in office, be, and they are hereby, restrained from collecting the taxes referred to in plaintiffs' petition, in accordance to the prayer thereof, to wit, the levies of the city of Kansas City, Kansas, and the board of education of Kansas City, Kansas, for the year 1893, against descriptions of land numbered one, four, five, six, seven, eight, and nine, as shown in said petition; also the levies of said Wyandotte township and said school district No. nine (9) for the year 1893 against so much of the road-bed, right of way, and other property of said railway company assessed by the State board of assessors as is located within the descriptions contained in Exhibit "A" to said petition and which is described as follows:

Main track, 1.71 miles, at $12,042.72 per mile	$20,593.00
Side track, 25.75 miles, at $2,500 per mile	64,375.00
Buildings and improvements...	26,000.00
Total	110,968.00

O K.

T. P. ANDERSON, *Judge.*

Attest: C. S. McCONIGAL, *Clerk,*
[SEAL.] By F. L. KENNEY, *Deputy.*

18 UNITED STATES OF AMERICA.

STATE OF KANSAS, *Wyandotte County,* } ss:

Court of Common Pleas.

The State of Kansas to the sheriff of Wyandotte county, in said State, Greeting:

You are hereby commanded to notify The City of Kansas City, Kansas; The Board of Education of the City of Kansas City, Kansas; M. G. McLean, as county treasurer of Wyandotte county, Kansas; Charles E. Bruce, as county clerk of Wyandotte county, Kansas; The Township of Wyandotte, of Wyandotte county, Kansas, and School District Number Nine of Wyandotte County, Kansas, defendants, that they have been sued by S. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doan, and F. R. Coudert, as receivers of the Union Pacific Railway Company, plaintiffs, in the court of common pleas, sitting within and for the county of Wyandotte *county*, and that unless they answer by the twelfth day of January, 1894, the petition of said plaintiff- against them filed in

the clerk's office of the court aforesaid, the same will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 23rd day of December, 1893.

Witness my hand and the seal of the said court, affixed at my office, in the city of Kansas City, this 15th day of December, 1893.

[SEAL.] C. S. McCONIGAL, *Clerk*,
By F. L. KENNEY, *Deputy*.

STATE OF KANSAS, }
County of Wyandotte, } *ss*:

Received this summons on the 15th day of December, 1893, at 10 o'clock a. m., and served the same in my county on the within defendant, The City of Kansas City, Kansas, by delivering to N. Barnes personally, as mayor of said city, a true copy of said summons, with all the endorsements thereon; served the same on The Board of Education of the City of Kansas City, Kansas, by delivering to J. H. Gadd personally, as president of said board, a true copy of said summons as above; served the same on M. G. McLean, as county treasurer of Wyandotte county, Kansas, by delivering to him personally a true copy of said summons as above; served the same on Charles E. Bruce, as county clerk of Wyandotte county, by delivering to him personally a true copy of said summons as above; served the same on The Township of Wyandotte, of Wyandotte county, Kansas, by delivering to James Moore personally, as trustee of said township, a true copy of said summons as above, and served the same on the School District No. Nine (9) of Wyandotte County, Kansas, by delivering to C. S. Meade personally, as director of said district, a true copy of said summons as above, on the 20th day of December, 1893.

S. S. PETERSON,
Sheriff of Wyandotte County, Kansas,
By J. S. CUMMINS, *Deputy*.

Copies	$1.50
Service	1.75
Mileage	2.00
Total	$5.25

19 Endorsed: No. 1647. Court of common pleas of Wyandotte county, Kansas. Summons. Issued December 15th, 1893. Returnable December 23rd, 1893. S. H. H. Clark *et al.*, receivers, *vs.* The City of Kansas City, Kansas, *et al.* Williams, Loomis & Blair, plaintiffs' attorneys. Filed December 28th, 1893. C. S. McGonigal, clerk, by F. L. Kenney, deputy. Temporary restraining order allowed.

20 And thereupon, on the 5th day of November, 1894, the plaintiffs herein filed with the clerk of said court their bond for twenty-five hundred ($2,500.00) dollars, a copy of which said

bond, together with the endorsements thereon, being in words and figures as follows, omitting the caption thereof:

Bond.

Know all men by these presents that J. R. Mulvane and Henry Strong, of Topeka, Shawnee county, Kansas, are held and firmly bound unto the above-named defendants and each and every of them in the penal sum of twenty-five hundred dol-ars; for the payment of which they hereby bind themselves, their heirs, executors, administrators, and assigns.

The condition- of the above obligation are such that whereas a temporary injunction was granted by said court in the above-entitled cause to take effect upon the filing by said plaintiffs of an injunction bond in the sum of twenty-five hundred dollars, subject to the approval of the clerk of this court:

Now, if the above-named plaintiffs shall save said defendants and each and every of them harmless from all damages which they or either of them may sustain if it be finally decided that said temporary injunction ought not to have been granted, then this obligation to be null and void; otherwise to remain in full force and effect.

In witness whereof said parties have hereunto set their hands and seals this 3rd day of November, A. D. 1894.

J. R. MULVANE.
HENRY STRONG.

STATE OF KANSAS, } ss:
County of Shawnee, }

The above-named J. R. Mulvane, of lawful age, being by me first duly sworn, deposes and says that he is worth over and above all legal exemptions and liabilities more than the sum of twenty-five hundred dollars.

J. R. MULVANE.

Subscribed and sworn to before me this 3rd day of November, 1894.

[SEAL.] FRANK E. SMITH,
Notary Public.

My commission expires February 27th, 1898.

STATE OF KANSAS, } ss:
County of Shawnee, }

The above-named Henry Strong, of lawful age, being by me first duly sworn, deposes and says that he is worth over and above all legal exemptions and liabilities more than the sum of twenty-five hundred dollars.

HENRY STRONG.

Subscribed and sworn to before me this 3rd day of November, 1894.

[SEAL.] FRANK E. SMITH,
Notary Public.

My commission expires February 27th, 1898.

21 The above bond approved November 5th, 1894.
GEO. H. JENKINS, *Clerk.*

Endorsed: S. H. H. Clark *et al.*, receivers, *vs.* The City of Kansas City, Kansas. Filed Nov. 5th, 1894. Geo. H. Jenkins, clerk.

And thereupon, on the 12th day of June, 1895, the defendants herein filed with the clerk of said court their demurrer to the petition of the *of the* plaintiff- herein filed, a copy of which demurrer being in words and figures as follows:

S. H. H. CLARK ET AL., Receivers, Plaintiffs,
vs.
THE CITY OF KANSAS CITY ET AL., Defendants. } No. 1647.

Demurrer.

The City of Kansas City, Kansas; Benjamin Schnierle, county treasurer; Charles E. Bruce, county clerk of Wyandotte county, Kansas, and The Board of Education of the City of Kansas City, Kansas, demur to the petition in this action, and for cause of demurrer state that it appears upon the face of the petition:

First. That the petition does not state facts sufficient to constitute a cause of action.

K. P. SNYDER AND
T. A. POLLOCK,
Attorneys for the Defendants, Kansas City et al.
S. C. MILLER,
Attorney for Defendant Benjamin Schnierle, County Treasurer, and C. E. Bruce, County Clerk.

Endorsed: Court of common pleas. S. H. H. Clark *et al.*, receivers, *vs.* The City of Kansas City, Kansas, *et al.* Demurrer. Filed June 12th, 1895. Geo. H. Jenkins, clerk.

22 In the Court of Common Pleas of Wyandotte County, Kansas.

S. H. H. CLARK ET AL., Receivers, Plaintiffs,
vs.
THE CITY OF KANSAS CITY, KANSAS, ET AL., Defendants.

Journal Entry.

Now, on this 12th day of June, 1895, the defendants are given leave to plead instanter, not to delay trial.

And thereupon, on the 13th day of June, 1895, the plaintiffs herein filed with the clerk of said court their certain motion to continue the prosecution of this case in the name of S. H. H. Clark *et al.*, a copy of which motion, omitting the caption thereof, being in words and figures as follows:

Motion.

Now come the above-named plaintiffs and show to the court that subsequent to the filing of the petition in this cause and upon the 16th day of July, 1894, the above-named S. H. H. Clark, Oliver W. Mink, and E. Ellery Anderson were by the United States circuit court for the district of Kansas, in an action pending in said court wherein Russell Sage and George J. Gould, trustees, were complainants and The Union Pacific Railway Company *et al.* were defendants appointed receivers of that portion of the railway and properties of the Union Pacific Railway Company covered by the consolidated mortgage of the Kansas Pacific Railway Company, dated the first day of May, 1879.

That by said order the said Clark, Mink, and Anderson, as receivers, were directed to retain possession of the lands, land grant, railroad, and property of said Union Pacific Railway Company covered by said Kansas Pacific consolidated mortgage, and as receivers in said Sage and Gould case to continue to maintain and operate all and singular the lines of railway embraced in said mortgage as a part of the Union Pacific system.

Said plaintiffs further show to the court that immediately after their appointment as receivers in the Sage and Gould case, as aforesaid, the said Clark, Mink, and Anderson duly qualified and entered upon the discharge of their duties as such receivers.

That thereafter John W. Doane and Frederick R. Coudert were duly appointed by the United States circuit court for the district of Kansas in said case of Sage and Gould against The Union Pacific Railway Company *et al.* additional receivers for that portion of the railway lines and property of the Union Pacific Railway Company covered by said Kansas Pacific consolidated mortgage, with powers in all respects similar and equal to those conferred upon said Clark, Mink, and Anderson; that immediately after their appointment said Doane and Coudert duly qualified and entered upon the discharge of their duties as such receivers.

Said plaintiffs further show to the court that all of the property in controversy in this cause is covered by said Kansas Pacific consolidated mortgage, and that the same is now under the exclusive charge and custody of said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederick R. Coudert, as receivers in said case of Sage and Gould, trustees, against The Union Pacific Railway Company *et al.*, and that as receivers in said Sage and Gould case they have succeeded to all the powers conferred upon them as receivers under the terms of their original appointment, the said original appointment being the same appointment referred to in the petition filed in this cause.

Wherefore the said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederick R. Coudert pray that this action may be continued in their names, as receivers of the Union Pacific Railway Company, appointed in the case of
23 Russel Sage and George J. Gould, trustees, against The Union Pacific Railway Company *et al.*, pending in the United States circuit court for the district of Kansas, first division.

A. L. WILLIAMS,
N. H. LOOMIS, AND
R. W. BLAIR,
Attorneys for said Receivers.

STATE OF KANSAS, } ss:
Shawnee County, }

N. H. Loomis, being duly sworn, says that he is one of the attorneys for the above-named receivers; that he has read the foregoing and knows the contents thereof, and that the statements of fact therein contained are true.

N. H. LOOMIS.

Subscribed and sworn to before me this 23rd day of March, A. D. 1895.

[SEAL.] FRANK E. SMITH,
Notary Public.

My commission expires February 27th, 1898.

Endorsed: No. 1647. In the court of common pleas of Wyandotte county, Kansas. S. H. H. Clark *et al.*, receivers Union Pacific Railway Company, plaintiffs, *vs.* The City of Kansas City, Kansas, *et al.*, defendants. Motion. Motion No. 2090. Filed June 13th, 1895. Geo. H. Jenkins, clerk.

24 In the Court of Common Pleas of Wyandotte County, Kansas.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. Doane, and F. R. Coudert, Receivers of the Union Pacific Railway Company, Plaintiffs,

vs.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF EDUCATION of the City of Kansas City, Kansas; M. G. McLean, as County Treasurer of Wyandotte County, Kansas; Charles E. Bruce, as County Clerk of Wyandotte County, Kansas, and School District Number Nine (9) of Wyandotte County, Kansas, Defendants.

Journal Entry.

Upon this 13th day of June, 1895, the plaintiffs appearing by A. L Williams, Moore and Berger, and N. H. Loomis, their attorneys, and the defendants appearing by K. P. Snyder and T. J. Pollock, their attorneys, and it being made to appear to the court that the above-named S. H. H. Clark, Oliver W. Mink, E. Ellery Ander-

son, J. W. Doane, and F. R. Coudert have since the commencement of this action been appointed receivers of that portion of the Union Pacific Railway Company covered by the consolidated mortgage of the Kansas Pacific Railway Company, including all of the property in controversy in this cause, by the United States circuit court for the district of Kansas, in an action therein pending, wherein Russel Sage and George J. Gould are complainants and The Union Pacific Railway Company *et al.* are defendants, and that as such receivers in the Sage and Gould case they now have exclusive charge and control of all the property in controversy in this cause, and have succeeded to all the powers possessed by them over said property under their original appointment, said original appointment being the same appointments referred to in plaintiffs' petition filed herein.

And now, upon the application of said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert and all parties consenting thereto, it is by the court ordered that this cause be continued in the name of said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, appointed in the case of Russell Sage and George J. Gould, trustees, against The Union Pacific Railway Company *et al.*, pending in the United States circuit court for the district of Kansas, first division.

It being further made to appear to the court that the above-named M. G. McLean has been succeeded as county treasurer of Wyandotte county by Benjamin Schnierle, it is by the court ordered, all parties consenting thereto, that said Benjamin Schnierle be substituted as a party defendant herein in the place of said M. G. McLean.

25 In the Court of Common Pleas of Wyandotte County, Kansas.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. Doane, and F. R. Coudert, Receivers of the Union Pacific Railway Company, Plaintiffs,

vs.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF EDUCATION of the City of Kansas City, Kansas; Benjamin Schnierle, as County Treasurer of Wyandotte County, Kansas; Charles E. Bruce, as County Clerk of Wyandotte County, Kansas; The Township of Wyandotte, Wyandotte County, Kansas, and School District Number Nine (9) of Wyandotte County, Kansas, Defendants.

Journal Entry.

JULY 3RD, 1895.

Upon this day this cause comes regularly on for final hearing upon the issues joined herein, the defendants having announced that they intend to stand upon their demurrer to plaintiffs' petition.

Plaintiffs appeared by A. L. Williams, Moore and Berger, and N. H. Loomis, their attorneys.

The defendants appeared by K. P. Snyder and T. A. Pollock, their attorneys.

The court, having heard the arguments of counsel and being fully advised in the premises, finds and adjudges that the statute under which the property of the Union Pacific Railway Company in controversy in this cause was attempted to be taken within the limits of Kansas City, Kansas, to wit, chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to cities of the first class, and adding thereto certain adjoining territory," is unconstitutional, null, and void, and therefore that said property of the Union Pacific Railway Company is not and has not been included within the limits of Kansas City, Kansas, because said ordinance set forth in plaintiffs' petition is void, being based upon an unconstitutional law, and is not and has not been subject to the jurisdiction of said city.

Wherefore the demurrer of the defendants to plaintiffs' petition is overruled; to which ruling of the court defendants duly except.

It is therefore ordered, adjudged, and decreed that said defendant, Benjamin Schnierle, as county treasurer of Wyandotte county, Kansas, his deputies, assistants, clerks, and successors in office, and each and every of them, be, and they are hereby, permanently enjoined from collecting the tax levies or assessments of said City of Kansas City, Kansas, and The Board of Education of the City of Kansas City, Kansas, against the following-described lands of the Union Pacific Railway Company:

1. Commencing at the northeast corner of the southeast quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25) east, in Wyandotte county, Kansas, thence south forty (40) poles; thence east to the Kansas river; thence down the same to the prolongation of the east and west center line of said section fifteen (15); thence west to beginning.

2. Also commencing at the northeast corner of the southeast quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25) east, in Wyandotte county, Kansas, thence west to the center of said section fifteen (15); thence north eighty (80) poles; thence west fifty-seven (57) poles; thence south to the northerly line of Euclid avenue, in the original town site of Armstrong; thence easterly along the northerly line of the Euclid avenue to the southerly line of Fifth street; thence along the southerly line on Fifth street to its intersection with the southerly line of Muncie boulevard; thence westerly along the southern line of the Muncie boulevard to the west line of said section fifteen (15); thence south to the southwest corner of the southwest quarter (¼) of section fifteen (15);
26 thence east eighty (80) poles; thence north fifty-two (52) poles; thence east eighty-five (85) poles; thence north twenty-eight (28) poles; thence east eight (8) poles; thence north one hundred ninety-nine (199) feet; thence east three hundred fifty-five & eight-tenths (355.8) feet to the east line of Third street, in McAlpine's addition; thence north one hundred sixty (160) feet; thence east two hundred seventy-five (275) feet to the center line of Second street, in McAlpine's addition, produced; thence north one hundred thirty (130) feet; thence east three hundred fifteen (315) feet to the prolongation of the center line of First street, in McAlpine's addition; thence

north one hundred thirty-two and eight-tenths (132.8) feet; thence east to the east line of said section fifteen (15); thence north forty (40) poles to beginning.

Excepting, however, from the foregoing description the following-described tract of land conveyed by the Union Pacific Railway Company to the Kansas City and Topeka Railway Company, March 11th, 1889, to wit:

A strip of land three hundred eighty-two and forty-eight-hundredths (382.48) feet wide through the west half (½) of the southwest quarter (¼) of said section fifteen (15), more specifically described as follows:

Beginning at a point five hundred fifty-three (553) feet north of the southeast corner of the southwest quarter (¼) of the southwest quarter (¼) of said section fifteen (15), said point being one hundred fifty (150) feet south of the center line of the main track of the Kansas City and Topeka railway as now located, thence westerly and parallel to the center line of said track thirty-five (35) feet; thence south one hundred eighty-two and forty-eight-hundredths (382.48) feet distant therefrom to the west line of said section fifteen (15); thence north along the west line of said section fifteen (15) three hundred ninety-two and thirty-hundredths (392.30) feet; thence easterly and parallel to the center line of said main track and fifty (50) feet distant therefrom thirteen hundred sixty-two (1,362) feet to the east line of the west half (½) of the southwest quarter (¼) of said section fifteen (15); thence south two hundred (200) feet to the place of beginning.

3. Also commencing at a point where the northerly line of the Union Pacific Railway Company's right of way intersects the east line of section sixteen (16), township eleven (11), range twenty-five (25) east, in Wyandotte county, Kansas, thence northwesterly along said northerly line of the right of way of the Union Pacific railway to the west line of said section sixteen (16); thence south along the west line of said section sixteen (16) about one hundred (100) feet to the southerly line of the right of way of the Union Pacific railway; thence southeasterly along the southerly line of said right of way to the east line of said section sixteen (16); thence north about one hundred (100) feet to beginning.

It is further ordered, adjudged, and decreed by the court that said defendants, C. E. Bruce, as county clerk of said county, his deputies, assistants, clerks, and successors in office, and each and every of them, be, and they are hereby, enjoined from extending upon the tax-rolls of said Wyandotte county, Kansas, against said property of the Union Pacific Railway Company any of the tax levies or assessments of said city of Kansas City, Kansas, or of the said board of education of Kansas City, Kansas.

It is further ordered by the court by consent of the parties that the levies of the proper townships and school districts be extended against said property of the Union Pacific Railway Company upon the tax-rolls of said Wyandotte county in lieu of the levies of said city of Kansas City, Kansas, and said board of education of Kansas City, Kansas, hereby enjoined, but no penalties, interest, or costs

shall be added, said taxes to be collected in the manner prescribed by law.

It is further ordered that the extension of said levies against said property as aforesaid and the collection of said taxes be staid until this cause has been finally disposed of on appeal to the su-
27 preme court or until defendants have filed a written statement herein declaring their intention not to appeal.

It is further ordered, adjudged, and decreed that the plaintiffs do have and recover of and from the said defendants their costs herein, taxed at fifty-six dollars and forty cents ($56.40), for which let execution issue.

It is further ordered, adjudged, and decreed that this judgment shall not in any way affect any rights vested in the defendants or either of them by virtue of any contract heretofore entered into between said Union Pacific Railroad Company and said Kansas City for the building of a viaduct over the land above described.

Defendants except to the foregoing judgment.

Dated July 3rd, 1895.

O K.

N. H. LOOMIS,
Attorney for Plaintiffs.

And thereafter, on the 18th day of September, 1895, there was filed with the clerk of said court in the above-entitled case a further agreement, a copy of which is in words and figures as follows:

It is also further agreed that this decree shall not in any way affect any rights the said city has in Mill street, running across the said Union Pacific Railway Company's ground.

28 *Certificate.*

STATE OF KANSAS, }
County of Wyandotte, } *ss:*

I, J. W. Howlitt, clerk of the court of common pleas of Wyandotte county, Kansas, do hereby certify that the above and foregoing are true and correct copies and a true and correct transcript of the petition, summons and return thereon, demurrer to petition, motions, orders, pleadings, findings, judgments, and all other acts and proceedings of the court and of the whole record in the case of S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, plaintiffs, *vs.* The City of Kansas City, Kansas; The Board of Education of the City of Kansas City, Kansas; M. G. McLean, as county treasurer of Wyandotte county, Kansas; Charles E. Bruce, as county clerk of Wyandotte county, Kansas; The Township of Wyandotte, of Wyandotte county, Kansas, and School District No. Nine (9) of Wyandotte County, Kansas, defendants, No. 1647, in the court of common pleas of Wyandotte county, Kansas.

In witness whereof I have hereunto affixed my official seal and signature this 16th day of January, 1896.

[SEAL.] J. W. HOWLETT,
Clerk of the Court of Common Pleas of Wyandotte County, Kansas.

Filed March 5th, 1896.

C. J. BROWN,
Clerk Supreme Court.

Exhibit "A."

29 And on the 5th day of March, 1898, there was issued from the office of the clerk of the supreme court of the State of Kansas a summons in error, which, with the service thereof endorsed thereon, is in words and figures as follows, to wit:

30 STATE OF KANSAS, } ss:
Supreme Court, }

The State of Kansas to the sheriff of Shawnee county, Greeting:

You are hereby commanded to notify S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific R'l'y Co., defendants in error, that The City of Kansas City, Kansas, *et al.*, plaintiffs in error, did, on the 5th day of March, A. D. 1896, file in the clerk's office of the supreme court of Kansas a petition in error and transcript of record, the object of which is to obtain a reversal of a certain judgment rendered by the court of common pleas sitting within and for the county of Wyandotte and State of Kansas in an action pending before said court, wherein the said defendants in error were plaintiffs and the said plaintiffs in error were defendants.

You will make due return of this summons in error on or before the 16th day of March, A. D. 1896.

Witness my hand and the seal of the supreme court affixed hereto, at my office, in Topeka, this 5th day of March, A. D. 1896. [SEAL.]

C. J. BROWN,
Clerk Supreme Court.

31 [Endorsed:] No. 10571. Supreme court, State of Kansas. The City of Kansas City, Kansas, *et al. vs.* S. H. H. Clark *et al.*, rec's U. P. R'l'y Co. Summons in error. Issued March 5th, 1896. Returnable March 16th, 1896. Filed Mar. 12, 1896. C. J. Brown, clerk sup. court. S. C. Miller & K. P. Snyder, T. A. Pollock, attorney- for plaintiff- in error.

STATE OF KANSAS, } ss:
County of ——, }

I received this summons in error on the 6th day of March, 1896, at 10 o'clock a. m., and served the same on the 11 day of March, 1896, by delivering a true and certified copy of same to A. L. Williams, R. W. Blair, and N. H. Loomis personal-.

R. B. KEPLEY, *Sheriff,*
By A. T. LUCAS, *Deputy.*

Fees.

Service	1.00
Mileage	
Copy	.75
Total	1.75

32 And afterwards, on the 1st day of January, 1898, the same being one of the regular judicial days of the July term, 1897, of the supreme court of the State of Kansas, the said court in session in the supreme court room, in the city of Topeka, there being present the Honorable Frank Doster, chief justice, and the Honorable Wm. A. Johnston and the Honorable Stephen H. Allen, associate justices, and John Martin, Esq., clerk of said court, the following proceedings were had and entered of record, to wit:

33 *Journal Entry of Assignment.*

The following cases were ordered assigned for hearing at the March, 1898, session of this court on the dates as follows:

* * * * * * *

City of Kansas City *vs.* Clark *et al.*, No. 10571, page 13, March 2.

* * * * * * *

33½ And aftereard, on the 1st day of March, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas a proof of service of plaintiffs in error's brief, which is in words and figures as follows, to wit:

34 Service of this brief hereby acknowledged upon this 24th day of Feb., 1898.

A. L. WILLIAMS &
N. H. LOOMIS,
Att'ys for Def'ts in Error.

In the Supreme Court of the State of Kansas.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF Education of the City of Kansas City, Kansas; The Township of Wyandotte, of Wyandotte County, Kansas; School District No. 9, Wyandotte County, Kansas; Benjamin Schnierle, as County Treasurer of Wyandotte County, Kansas; Leonard C. Daniels, as Successor in Office of Charles E. Bruce and as County Clerk of Wyandotte County, Kansas, Plaintiffs in Error,

vs.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Defendants in Error.

10571.

Brief of Plaintiffs in Error.

T. A. Pollock and Geo. B. Watson, attorneys for plaintiffs in error.

Filed Mar. 1, 1898.

JNO. MARTIN,
Clerk Supreme Court.

35 And also, on the 1st day of March, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas a stipulation, which, with the endorsements thereon, is in words and figures as follows, to wit:

36 Henry McGrew. Geo. B. Watson. A. E. Watson.

Law office of McGrew, Watson & Watson, N. E. corner 7th and Minnesota Ave.

Telephone west 42.

KANSAS CITY, KANS., *Feb. 28th*, 1898.

Hon. John Martin, clerk supreme court, Topeka, Kansas.

DEAR SIR: I forward you today a copy of the brief of plaintiffs in error in the case of The City of Kansas City *et al. vs.* S. H. H. Clark *et al.*, defendants in error, with an acknowledgement of the service of said brief endorsed thereon.

By an arrangement with Mr. A. L. Williams, one of the attorneys for the defendant- in error, the case is to be continued until the May sitting of said court. If Mr. Williams should not be present, please call the attention of the court to such arrangement.

Yours truly, GEO. B. WATSON.

(Endorsed:) 10571. City of Kansas City *et al. vs.* S. H. H. Clark *et al.* Request to continue until May, 1898. Filed Mar. 1, 1898. Jno. Martin, clerk supreme court.

37 And afterward, on the 2nd day of March, 1898, the same being one of the regular judicial days of the January term, 1898, of the supreme court of the State of Kansas, the said court in session at the supreme court room, in the city of Topeka, there being present the Honorable Frank Doster, chief justice; the Honorable Wm. A. Johnston, and the Honorable Stephen H. Allen, associate justices, and John Martin, Esq., clerk of said court, the following proceedings were had and entered of record, to wit:

38 *Journal Entry of Continuance.*

CITY OF KANSAS CITY ET AL., Pl'ffs in Error,
vs. } 10571.
S. H. H. CLARK, ETC., ET AL., Def'ts in Error.

On motion of defendants in error, it is ordered that the further hearing of this cause be continued to the May, 1898, session of this court and assigned for hearing on May 3rd.

39 And afterward, on the 3rd day of May, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas an order to submit, which, with the endorsements thereon, is in words and figures as follows, to wit:

40 Office of T. A. Pollock, city attorney, rooms 307, 308, 309, Portsmouth building.

Telephone west 111.

KANSAS CITY, KANSAS, *May 2nd*, 1898.

Hon. John Martin, clerk supreme court, Topeka, Kansas.

DEAR SIR: Submit cases of Kansas City *vs.* S. H. Clark *et al.* and Kansas City *vs.* Hanson *et al.* in supreme court on brief filed on part of plaintiff in error, Kansas City; oral argument waived.

Respectfully, T. A. POLLOCK,
City Attorney.

(Endorsed:) 10571, 10708. Order of plaint. to sub. on br. Filed May 3, 1898. Jno. Martin, clerk supreme court.

41 And also, on the 3rd day of May, 1898, the same being one of the regular judicial days of the January term, A. D. 1898, of the supreme court of the State of Kansas, said court in session at the supreme court room, in the city of Topeka, there being present the Honorable Frank Doster, chief justice, and the Honorable Wm. A. Johnston and the Honorable Stephen H. Allen, associate justices, and John Martin, clerk of said court, the following proceedings were had and entered of record, to wit:

42 *Journal Entry of Submission.*

CITY OF KANSAS CITY, KANSAS, ET AL, Pl'ffs in Error,
vs.
S. H. H. CLARK, Receivers, etc., ET AL., Def'ts in Error. } 10571.

This cause comes on to be heard on the petition in error and the transcript of record of the district court of Wyandotte county; and thereupon, after oral argument by A. L. Williams, for defendants in error, said cause was submitted on briefs of counsel by both parties and taken under advisement by the court.

43 And afterwards, on the 11th day of June, 1898, the same being one of the regular judicial days of the January term, 1898, of the supreme court of the State of Kansas, said court being in session at the supreme court rooms, at the city of Topeka, there being present the Honorable Frank Doster, chief justice, and the Honorable Wm. A. Johnston and the Honorable Stephen H. Allen, associate justices, and John Martin, Esq., clerk of said court, the following proceeding was had and remains of record, to wit:

44 *Journal Entry of Judgment.*

CITY OF KANSAS CITY ET AL., Pl'ffs in Error,
vs.
THE U. P. R'L'Y CO. ET AL., Def'ts in Error. } 10571.

This cause comes on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be reversed, and

that this cause be remanded, with directions to sustain the demurrer to the petition. It is further ordered that the defendants in error pay the costs of this case in this court, taxed at $—; and hereof let execution issue.

45 And also, on the 11th day of June, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas a syllabus and opinion of the said cupreme court in said cause, which is in words and figures as follows, to wit:

46 THE CITY OF KANSAS CITY ET AL.
vs.
THE UNION PACIFIC RAILWAY COMPANY ET AL. } No. 10571.

Error from Wyandotte county reversed.

Syllabus by the Court, Doster, C. J.

1. One cannot be heard to complain that a statute which discriminates between classes of persons in the imposition of burdens of municipal control and taxation is unconstitutional as being a denial of the equal protection of the law, unless he belongs to one of the classes discriminated against.
2. The statute, section 15, chapter 32, General Statutes 1897, which provides for the extension of city boundaries over certain classes of adjoining lands, is not violative of the fourteenth amendment to the Constitution of the United States because it exempts agricultural lands from its provisions.

47 THE CITY OF KANSAS CITY ET AL.
vs.
THE UNION PACIFIC RAILWAY COMPANY ET AL. } 10571.

Error from Wyandotte county reversed.

The opinion of the court was delivered by DOSTER, C. J.:

Section 1, chapter 74, Laws of 1891; section 15, chapter 32, General Statutes 1897, reads as follows:

"That whenever any territory adjoining or touching the city limits of any city of the first class having a population of 30,000 inhabitants or more shall be subdivided into lots and blocks, or whenever any unplatted tract of land shall lie upon or mainly within any such city, or is so situated as to be bounded on three-fourths of its boundary line by platted territory of or adjacent to such city, or by the boundary line of such city or by both, the same may be added to and made a part of the city by ordinance duly passed, which ordinance shall describe the territory by giving the name of the subdivision or addition as platted, and by giving the metes and bounds of such unplatted tract, or by giving the metes and bounds of each tract and plat so taken in separately, or of the entire tract or tracts so taken in with the section, town, range and county in which the same is located without further proceedings;

but nothing in this act shall be taken or held to apply to any tract or tracts of lands used for agricultural purposes, when the same is not owned by any railroad or other corporation."

By ordinance of March 8th, 1892, the city council of Kansas City, in pursuance to the above statute, extended the city boundaries so as to include certain lands belonging to the defendant in error, The Union Pacific Railway Company. The preamble to this ordinance reads as follows:

48 "Whereas a certain unplatted territory belonging to the Union Pacific Railroad Company lies upon and mainly within the city of Kansas City, Kansas, and is so situated as to be bounded on three-fourths of its boundary line by platted territory of and adjoining to said city, which said railroad land, by virtue of its location, enjoys the benefits of said city without sharing its burdens: Now, therefore."

This preamble shows that the added tracts belonged to one of the classes of lands the annexation of which is authorized by the statute. The defendants in error obtained a perpetual injunction against the collection of city taxes to which the lands in question became subject after their incorporation into the city limits. Error is now prosecuted from the judgment awarding the injunction. The questions for decision are presented to this court, as in the court below, upon the demurrer of the defendants, now plaintiffs in error, to the petition of the plaintiffs, now defendants in error. The contention of the defendants in error is that the act providing for the extension of city boundaries discriminates between classes of real-estate owners, and is therefore violative of that part of the fourteenth amendment to the Constitution of the United States which prohibits the States from depriving persons of property without due process of law or denying to persons within their jurisdiction the equal protection of the law. This contention is based upon the exception forming the last clause of the statute quoted: "But nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation." So far as this statute discriminates between classes of owners of agricultural lands

49 the defendants in error cannot be heard to complain. Their lands are not agricultural lands; at least, they do not allege them to be such lands, but, on the contrary, allege that parts of them are used for railroad purposes, and that the remaining portions are vacant and unoccupied lands held and possessed for railroad purposes. Owning no agricultural land, the defendants in error are not affected by the discrimination which the statute makes between the different classes of owners of such kind of land, and they cannot, therefore, be heard to complain on that score. "A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has, therefore, no interest in defeating it." Cooley's Constitutional Limitations, 6 ed., 196.

The statute, however, does exempt some agricultural lands from its operation. Of this the defendants in error complain, and for

the like reason as before. The discrimination in this particular is not in respect of the ownership of the lands, but in respect of their character—the uses to which devoted. It is not claimed in specific terms that the legislature is powerless to authorize the extension of city boundaries over lands platted for city purposes and used for city residences and at the same time exempt agricultural lands having to the city like relations of situation, contiguity, and otherwise. Such claim is comprehended, however, within the general scope of the argument made. We do not assent to it. No case in assertion of such doctrine has been cited to us and none, we believe, can be found. The very fact of land not already surrounded by incorporated portions of the city being used for agricultural purposes is *prima facie* evidence of the rightfulness of its exemption from municipal control. "The fundamental idea of a municipal incorporation is to invest compact or dense populations with the
50 power of local self-government. Indeed the necessity for such corporations springs from the existence of centers or agglomerations of population having, by reason of density and numbers, local or peculiar interests and wants not common to adjoining sparsely settled or agricultural regions." Dillon's Municipal Corporations, 3 ed., sec. 183. Municipal incorporation involves of necessity the idea of corporate limits coterminous with the urban population and exclusive of the adjoining agricultural tracts. City limits are not, of course, always terminable with population. Manufacturing and other industrial institutions like railway yards, round-houses, grain elevators, and the like are often situated beyond the limits of city population. Ordinarily in such cases they are immediately adjoining it. In and around such places many persons are employed at labor both day and night, and the necessity for the inclusion of such places within city boundaries is just as great as though they formed parts of the residence and business portions of the city. To say that the tracts of land upon which these industrial institutions are situated may not be included within city boundaries and subjected to municipal control, because an adjoining tract of land used for farming purposes, but equally as near to the heart of the city, is not likewise brought within the city limits, is a claim to us unheard of before. It is the business of the legislature to enact general rules by which the boundaries of incorporated districts may be fixed in the first instance and by which additions thereto may subsequently be made. Dillon's Municipal Corporations, 3 ed., sec. 185. The special instances in which the general legislative rules may be applied must of necessity be left to the municipal authorities of the city in question. Instances may occur in which both legislature and city council will violate fundamental rules, but the petition of the plaintiffs below, the defendants in error here, does not show any such case.

It is contended that the act in question, though general in
51 its terms, is nevertheless special in point of fact, because at the time of its enactment there was and is yet but one city to which its provisions could apply. This does not make it a special law.

The judgment of the court below was wrong. It is reversed, with directions to sustain the demurrer to the petition.

All the justices concurring.

A true copy.

Attest:

____ ____,
Clerk Supreme Court.

52 And afterward, on the 2nd day of August, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition for a writ of error, which, with the endorsements thereon, is in the words and figures as follows, to wit:

53 In the Supreme Court of the State of Kansas.

THE CITY OF KANSAS CITY, KANSAS; THE Board of Education of the City of Kansas City, Kansas; The Township of Wyandotte, of Wyandotte County, Kansas; School District No. 9, Wyandotte County, Kansas; Benjamin Schnierle, as County Treasurer of Wyandotte County, Kansas; Leonard C. Daniels, as Successor in Office of Charles E. Bruce and as County Clerk of Wyandotte County, Kansas, Plaintiffs in Error, *vs.* S. H. H. CLARK, OLIVER W. MINK, E. ELLERY Anderson, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Defendants in Error.	Petition for Writ of Error.

Now come S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert as receivers of the Union Pacific Railway Company, defendants in error herein, and say that on or about the 11th day of June, 1898, this court entered judgment herein in favor of the plaintiffs in error and against these defendants in error, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of these defendants in error, all of which will more in detail appear from the assignment of errors, which is filed with this petition in error.

Wherefore these defendants in error pray that a writ of error may be allowed in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said Supreme Court of the United States.

A. L. WILLIAMS,
N. H. LOOMIS, &
R. W. BLAIR,
Attorneys for S. H. H. Clark et al., Defendants in Error.

54 [Endorsed:] 10571. In the supreme court of the State of Kansas. The City of Kansas City, Kansas, *et al.*, plaintiffs

in error, *vs.* S. H. H. Clark *et al.*, receivers of the Union Pacific Railway Company, defendants in error. Petition for writ of error. Filed Aug. 2, 1898. Jno. Martin, clerk supreme court.

55 And also, on the 2nd day of August, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition for reversal, which, with the endorsements thereon, is in words and figures as follows, to wit:

56 In the Supreme Court of the United States.

S. H. H. CLARK, OLIVER W. MINK, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Plaintiffs in Error,

vs.

THE CITY OF KANSAS CITY, KANSAS; THE Board of Education of the City of Kansas City, Kansas; The Township of Wyandotte, of Wyandotte County, Kansas; School District No. 9, Wyandotte County, Kansas; Benjamin Schnierle, as County Treasurer of Wyandotte County, Kansas; Leonard C. Daniels, as Successor in Office of Charles E. Bruce and as County Clerk of Wyandotte County, Kansas, Defendants in Error.

} Petition for Reversal.

S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, receivers of the Union Pacific Railway Company, in connection with their petition for a writ of error and their assignment of errors entitled and filed in this cause in the supreme court of the State of Kansas, pray that the judgment rendered against them in the supreme court of the State of Kansas on or about the 11th day of June, 1898, may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by reason of such judgment.

A. L. WILLIAMS,
N. H. LOOMIS, &
R. W. BLAIR,

Attorneys for S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, Receivers of the Union Pacific Railway Company, Plaintiffs in Error.

57 [Endorsed:] 10571. In the Supreme Court of the United States. S. H. H. Clark *et al.*, receivers of the Union Pacific Railway Company, plaintiffs in error, *vs.* The City of Kansas City, Kansas, *et al.*, defendants in error. Petition for reversal. Filed Aug. 2, 1898. Jno. Martin, clerk supreme court.

58 Be it remembered that on Tuesday, the 2nd day of August, 1898, before the Honorable Frank Doster, chief justice of the

supreme court of the State of Kansas, at his chambers, in the city of Topeka, the following proceeding was had and entered of record as follows, to wit:

59 In the Supreme Court of the State of Kansas.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD of Education of the City of Kansas City, Kansas; The Township of Wyandotte, of Wyandotte County, Kansas; School District No. 9 of Wyandotte County, Kansas; Benjamin Schnierle, as County Treasurer of Wyandotte County, Kansas; Leonard C. Daniels, as Successor in Office of Charles E. Bruce and as County Clerk of Wyandotte County, Kansas, Plaintiffs in Error,

vs.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY Anderson, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Defendants in Error.

} Journal Entry.

Upon this day come S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, receivers of the Union Pacific Railway Company, defendants in error in the above-entitled cause, by A. L. Williams, their attorney, and present to the undersigned, chief justice of the supreme court of the State of Kansas, their petition herein praying for the allowance of a writ of error in the above-entitled cause to the Supreme Court of the United States for the correction of certain errors complained of and more fully set forth in the assignment of errors accompanying said petition for a writ of error.

Upon consideration whereof it is hereby ordered that the said petition be, and the same is hereby, granted, and the said writ of error allowed. The said defendants in error thereupon present their supersedeas bond on said writ of error in the sum of ten thousand ($10,000) dollars, with P. I. Bonebrake, of Topeka, Kas., and J. R. Mulvane, of Topeka, Kas., as sureties.

Upon consideration whereof the said bond and the sufficiency of the sureties thereon is hereby approved by me.

Dated this 2d day of August, 1898.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

(Endorsed:) 10571. In the supreme court of the State of Kansas. The City of Kansas City *et al.*, plaintiffs in error, *vs.* S. H. H. Clark *et al.*, receivers of the Union Pacific Railway Company, defendants in error. Journal entry. Filed Aug. 2, 1898. Jno. Martin, clerk supreme court.

60 And also, on the 2nd day of August, 1898, there was filed in the office of the clerk of the supreme court of the State of

Kansas a writ of error, which, with the allowance thereof endorsed thereon, is in words and figures as follows, to wit:

61 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said supreme court of the State of Kansas, before you or some of you, being the highest court of law or equity of said State in which a decision could be had in a suit between The City of Kansas City, Kansas; The Board of Education of the City of Kansas City, Kansas; The Township of Wyandotte, of Wyandotte county, Kansas; School District No. 9, Wyandotte county, Kansas; Benjamin Schnierle, as county treasurer of Wyandotte county, Kansas; Leonard C. Daniels, as successor in office of Charles E. Bruce and as county clerk of Wyandotte county, Kansas, plaintiffs in error, and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, defendants in error, wherein there was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein there was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein there was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of said Constitution, treaty, statute, or commission, a manifest error hath happened, to the
62 great damage of the said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, as by their complaint appears, we, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on a day not exceeding thirty days from the 2d day of August, 1898, in the office of the clerk of the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court, this the 2d day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

{ The Seal of the Circuit Court of the United States, } { District of Kansas, 1862. }

GEO. F. SHARITT,
Clerk of the Circuit Court of the United States
for the District of Kansas.

Allowed by—
FRANK DOSTER,
Chief Justice of the Supreme Court
of the State of Kansas.

63 [Endorsed:] 10571. In the supreme court of the State of Kansas. The City of Kansas City, Kansas, *et al.*, plaintiffs in error, *vs.* S. H. H. Clark *et al.*, receivers of the Union Pacific Railway Company, defendants in error. Writ of error. Filed Aug. 2, 1898. Jno. Martin, clerk supreme court.

64 True and certified copies of the foregoing writ of error were, upon the 4th day of August, 1898, lodged with the clerk of the supreme court of Kansas by said receivers, defendants in error, for each of said plaintiffs in error, and the following endorsements made upon said copies:

65 Upon the first copy the following:

10571. Copy of writ of error lodged with clerk supreme court by defendants in error for plaintiffs in error. City of Kansas City *et al. vs.* Clark *et al.* Filed Aug. 4, 1898. Jno. Martin, clerk sup. court. For City of Kansas City, Kansas, plaintiff in error.

Upon the second copy the following:

10571. Copy of writ of error lodged with clerk supreme court by defendants in error for plaintiffs in error. City of Kansas City *vs.* Clark *et al.* Filed Aug. 4, 1898. Jno. Martin, clerk sup. court. For B'd of Education of the City of Kansas City, plaintiff in error.

Upon the third copy the following:

10571. Copy of writ of error lodged with clerk supreme court by defendants in error for plaintiffs in error. City of Kansas City *et al. vs.* Clark *et al.* Filed Aug. 4, 1898. Jno. Martin, clerk sup. court. For Twp. of Wyandotte, of Wyandotte County, Kansas, plaintiff in error.

Upon the fourth copy the following:

10571. Copy of writ of error lodged with clerk supreme court by defendants in error for plaintiffs in error. City of Kansas City *et al. vs.* Clark *et al.* Filed Aug. 4, 1898. Jno. Martin, clerk sup. court. For School District No. 9 of Wyandotte County, Kansas, plaintiff in error.

Upon the fifth copy the following:

10571. Copy of writ of error lodged with clerk supreme court by defendants in error for plaintiffs in error. City of Kansas City *et al. vs.* Clark *et al.* Filed Aug. 4, 1898. Jno. Martin, clerk sup. court. For Benjamin Schnierle, county treasurer, etc., plaintiff in error.

66 Upon the sixth copy the following:

10571. Copy of writ of error lodged with clerk supreme court by defendants in error for plaintiffs in error. City of Kansas City *et al. vs.* Clark *et al.* Filed Aug. 4, 1898. Jno. Martin, clerk sup. court. For Leonard C. Daniels, as county clerk, etc., plaintiff in error.

67 And also, on the 2nd day of August, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas an assignment of errors, which, with the endorsements thereon, is in words and figures as follows, to wit:

68 In the Supreme Court of the State of Kansas.

THE CITY OF KANSAS CITY, KANSAS; THE Board of Education of the City of Kansas City, Kansas; The Township of Wyandotte, of Wyandotte County, Kansas; School District No. 9, Wyandotte County, Kansas; Benjamin Schnierle, as County Treasurer of Wyandotte County, Kansas; Leonard C. Daniels, as Successor in Office of Charles E. Bruce and as County Clerk of Wyandotte County, Kansas, Plaintiffs in Error,	Assignment of Errors.
vs.	
S. H. H. CLARK, OLIVER W. MINK, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Defendants in Error.	

S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, receivers of the Union Pacific Railway Company, defendants in error herein, in connection with their petition for a writ of error, make the following assignment of errors, which, they aver, appear in the record in this cause, to wit:

First.

The said supreme court of the State of Kansas erred in reversing the judgment of the lower court.

Second.

The said supreme court of the State of Kansas erred in failing and refusing to affirm the judgment of the lower court.

Third.

The said supreme court of the State of Kansas erred in holding that these defendants in error could not complain of the fact that

chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class, and the adding thereto certain adjoining territory," was in violation of that part of the fourteenth amendment to the Federal Constitu-
69 tion which provides "that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

Fourth.

The said supreme court of the State of Kansas erred in failing and refusing to hold that chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class, and the adding thereto certain adjoining territory," was in violation of that part of the fourteenth amendment to the Federal Constitution which provides "that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

Fifth.

The said supreme court of the State of Kansas erred in refusing to hold that the exception contained in chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class, and the adding thereto certain adjoining territory," did not bring said act within the inhibition of that part of the 14th amendment to the Federal Constitution which provides "that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law," the exception in said statute herein referred to being as follows:

"But nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation."

Sixth.

The said supreme court of the State of Kansas erred in
70 holding that said chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class, and the adding thereto certain adjoining territory," was and is valid, in so far as these defendants in error are concerned, and binding upon them.

Seventh.

The said supreme court of the State of Kansas erred in holding that the action of the city of Kansas City in taking within its limits the property of the Union Pacific Railway Company, under the provisions of chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class, and the adding thereto certain adjoining territory," was legal,

and that the tax levies of said city extended against said property were valid.

A. L. WILLIAMS,
N. H. LOOMIS, &
R. W. BLAIR,
Attorneys for S. H. H. Clark et al., Receivers of the Union Pacific Railway Company, Defendants in Error.

71 [Endorsed:] 10571. In the supreme court of the State of Kansas. The City of Kansas City, Kansas, *et al.*, plaintiffs in error, *vs.* S. H. H. Clark *et al.*, receivers of the Union Pacific Railway Company, defendants in error. Assignment of errors. Filed Aug. 2, 1898. Jno. Martin, clerk supreme court.

72 And also, on the 2nd day of August, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas a supersedeas bond, which, with the approval thereof endorsed thereon, is in words and figures as follows, to wit:

73 Know all men by these presents that we, P. I. Bonebrake and J. R. Mulvane, of Topeka, Shawnee county, Kansas, are held and firmly bound unto the City of Kansas City, Kansas; the Board of Education of the City of Kansas City, Kansas; the Township of Wyandotte, of Wyandotte county, Kansas; School District No. 9, Wyandotte county, Kansas; Benjamin Schnierle, as county treasurer of Wyandotte county, Kansas; Leonard C. Daniels, as successor in office of Charles E. Bruce and as county clerk of Wyandotte county, Kansas, and each and every of them in the full and just sum of ten thousand ($10,000) dollars, to be paid to the said City of Kansas City, Kansas; the Board of Education of the City of Kansas City, Kansas; the Township of Wyandotte, of Wyandotte county, Kansas; School District No. 9, Wyandotte county, Kansas; Benjamin Schnierle, as county treasurer of Wyandotte county, Kansas; Leonard C. Daniels, as successor in office of Charles E. Bruce and as county clerk of Wyandotte county, Kansas, their successors, heirs, executors, administrators, and assigns, and each and every of them; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Whereas, upon or about the 11th day of June, A. D. 1898, in a suit depending in the supreme court of the State of Kansas between The City of Kansas City, Kansas; The Board of Education of the City of Kansas City, Kansas; The Township of Wyandotte, of Wyandotte county, Kansas; School District No. 9, Wyandotte county, Kansas; Benjamin Schnierle, as county treasurer of Wyandotte county, Kansas; Leonard C. Daniels, as successor in office of Charles E. Bruce and as county clerk of Wyandotte county, Kansas, plaintiffs in error, and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, as receivers of the Union Pacific Railway Company, defendants in error, judgment was rendered against said defendants in error, and the said defendants in error have obtained a writ of error in the said court

to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiffs in error, citing and admonishing them to be and appear in the Supreme Court of the United States, at the city of Washington, within thirty days from and after the 2d day of August, 1898:

Now, the condition of the above obligation is such that if the said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, receivers of the Union Pacific Railway Company, shall prosecute said writ of error to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed with our hands and dated this 2 day of August, 1898.

P. I. BONEBRAKE.
J. R. MULVANE.

Approved by—
FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

(Endorsed:) 10571. In the supreme court of the State of Kansas. The City of Kansas City, Kansas, *et al.*, plaintiffs in error, *vs.* S. H. H. Clark *et al.*, receivers of the Union Pacific Railway Company, defendants in error. Supersedeas bond. Filed Aug. 2, 1898. Jno. Martin, clerk supreme court.

74 And afterwards, on the 4th day of August, 1898, there was filed in the office of the clerk of the supreme court of the State of Kansas a citation, which, with the acknowledgment of service endorsed thereon and proof of service attached thereto, is in words and figures as follows, to wit:

75 UNITED STATES OF AMERICA, *ss:*

To the City of Kansas City, Kansas; the Board of Education of the City of Kansas City, Kansas; the Township of Wyandotte, of Wyandotte county, Kansas; School District No. 9, Wyandotte county, Kansas; Benjamin Schnierle, as county treasurer of Wyandotte county, Kansas; Leonard C. Daniels, as successor in office of Charles E. Bruce and as county clerk of Wyandotte county, Kansas, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the city of Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein you are plaintiffs in error and S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R. Coudert, receivers of the Union Pacific Railway Company, are defendants in error, to show cause, if any there*of*—, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank Doster, chief justice of the supreme court of the State of Kansas, this 2d day of August, 1898.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

Service of the foregoing citation hereby acknowledged upon this 3d day of August, 1898.

GEO. B. WATSON,
T. A. POLLOCK,
Attorneys for The City of Kansas City, Kans., et al., the Above-named Plaintiffs in Error in State Supreme Court.

76 [Endorsed:] 10571. In the supreme court of the State of Kansas. The City of Kansas City, Kansas, *et al.*, plaintiffs in error, *vs.* S. H. H. Clark *et al.*, receivers of the Union Pacific Railway Company, defendants in error. Citation. Filed Aug. 4, 1898. Jno. Martin, clerk supreme court.

77 In the Supreme Court of the State of Kansas.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF EDUCATION of the City of Kansas City, Kansas; The Township of Wyandotte, of Wyandotte County, Kansas; School District No. 9, Wyandotte County, Kansas; Benjamin Schnierle, as County Treasurer of Wyandotte County, Kansas; Leonard C. Daniels, as Successor in Office of Charles E. Bruce and as County Clerk of Wyandotte County, Kansas, Plaintiffs in Error,

vs.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. Doane, and F. R. Coudert, as Receivers of the Union Pacific Railway Company, Defendants in Error.

I, John Martin, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct, true, and complete transcript of pleadings and papers filed and of all proceedings had in the above-entitled cause as the same remains now on file and of record in my office.

Witness my hand and the seal of the supreme court of the State of Kansas affixed hereto, at my office, in the city of Topeka, this 22d day of August, 1898.

Seal Supreme Court, State of Kansas.

JNO. MARTIN,
Clerk Supreme Court.

Endorsed on cover: Case No. 16,987. Kansas supreme court. Term No., 402. S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane, and F. R Coudert, receivers of the Union Pacific Railway Company, plaintiffs in error, *vs.* The City of Kansas City, Kansas, *et al.* Filed September 13th, 1898.

No. 402.

NOV 25 1898
JAMES H. McKENNEY,
Clerk.

Brf. of Pierce & Williams for P.

No. 402.

Filed Nov 25 1898

IN THE

United States Supreme Court.

S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane and F. R. Coudert, as Receivers of The Union Pacific Railway Company,

Plaintiffs in Error,

vs.

The City of Kansas City, Kansas, et al.,

Defendants in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF FOR PLAINTIFFS IN ERROR.

WINSLOW S. PIERCE,
A. L. WILLIAMS,
N. H. LOOMIS,
Attorneys for Plaintiffs in Error.

The Hall Lithographing Co., Printers, Topeka. 77866

IN THE

United States Supreme Court.

S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, J. W. Doane and F. R. Coudert, as Receivers of The Union Pacific Railway Company,
Plaintiffs in Error,

vs.

The City of Kansas City, Kansas, et al.,
Defendants in Error.

No. 402.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of the Case.

Upon the tenth of March, 1891, the Legislature of Kansas passed an act authorizing cities of the first class to take certain property within their limits, and providing the method for so do-

ing. That act reads as follows (Chapter 74, Laws of 1891):

"CITIES OF THE FIRST CLASS.

"An act relating to certain cities of the first class, and the adding thereto certain adjoining territory.

"*Be it enacted by the Legislature of the State of Kansas:*

"Section 1. That whenever any territory adjoining or touching the city limits of any city of the first class having a population of 30,000 inhabitants or more shall be subdivided into lots and blocks, or whenever any unplatted tract of land shall lie upon or mainly within any such city, or is so situated as to be bounded on three-fourths of its boundary line by platted territory of or adjacent to such city, or by the boundary line of such city or by both, the same may be added to and made a part of the city by ordinance duly passed; which ordinance shall describe the territory by giving the name of the subdivision or addition as platted, and by giving the metes and bounds of such unplatted tract, or by giving the metes and bounds of each tract and plat so taken in separately, or of the entire tract or tracts so taken in, with the section, town, range and county in which the same is located, without further proceedings; *but nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation.*

Any other territory adjoining such city, whether platted or unplatted, may be added to and made a part of the city in the following manner: The city attorney shall prepare an ordinance describing the territory to be added to and made a part of the city, giving the name of the owner, if known, and if the name of the owner is unknown, then the words 'owner unknown' shall follow such description. After such ordinance has been presented to the mayor and council they shall fix a time not less than fifteen days nor more than thirty days from the date of the presentation of the ordinance when all parties affected by the passage of such ordinance may be heard before the mayor and council. After the time is fixed for such hearing, the city marshal shall serve a written or printed notice on all of the resident owners of unplatted territory embraced in such ordinance. Such notice shall be served by the city marshal in the same manner as a summons in a civil action before a justice of the peace. If any of the owners of any unplatted territory affected by such ordinance are non-residents of the county, or reside beyond the State, then the city clerk shall give notice by publication for ten days in some paper published in such city, and having a general circulation in the county in which said city is situated, giving a description of such unplatted tracts and a statement that they are included in such proposed ordinance, and stating when and where all parties interested may be heard. The first publication of said notice shall not be less than eight days, and the last publication thereof shall not be more than twenty-two days after the presentation of such ordinance. No notice whatever shall be necessary to the owners of platted territory. At any time after the expiration of thirty days, after the presentation of such ordinance, and after parties interested shall

have opportunity to be heard as aforesaid, the mayor and council may pass such ordinance, and cause the same to be published in the city official paper. Within thirty days after such publication the mayor of such city shall file in the office of the clerk of the district court of the county in which such city is situated a copy of said ordinance and the service of notices duly certified by the clerk of said city under the seal of the city, and also therewith due proof showing the publication of said ordinance. Thereupon said court shall consider said ordinance, and by its judgment either approve, disapprove or modify the same, first hearing all objections, if any, and proofs, if any, offered the said city or persons affected by said ordinance. Should said ordinance be approved or modified by said court, then the limits or area of said city shall be enlarged or extended as therein designated from the date of such approval or modification; but should it be disapproved entirely, then the limits or area of the city shall remain unaffected by said proceedings. But should the same be approved entirely, or modified or approved, the judgment of such court shall stand and the limits of such city shall be extended as in said judgment specified; and such judgment shall be final and conclusive upon all persons, companies and corporations, and in all courts, as to the limits or area of such city as thus enlarged or extended. The district court shall make a record of all findings and determinations in the premises, which shall be conclusive evidence of the facts so found and determined; and after the disapproval or modification of one ordinance, another or others may be passed and acted on in like manner and upon the notice.

"Sec. 2. That so much of section one of chapter ninety-nine of the Session Laws of 1887, relating

to cities of the first class, and all other acts and parts of acts in so far as the same are in conflict with the provisions of this act, are hereby repealed.

"Sec. 3. This act shall take effect and be in force from and after its publication in the official State paper.

"Approved March 10, 1891.

"Published in the official State paper April 2, 1891."

On March 8, 1892, the city council of Kansas City, Kansas, in pursuance of the above statute, extended the city boundaries so as to include large tracts of land belonging to the Union Pacific Railway Company. A portion of those lands were used for right of way and other railroad purposes, and a large part of them were vacant and unoccupied lands held by the railway company for its future emergencies. The ordinance extending the city boundaries reads as follows (record, page 14):

"ORDINANCE No. 2163.

"An ordinance adding certain lands therein described known as the Union Pacific lands to and making the same a part of the city of Kansas City, Kansas.

"Whereas, A certain unplatted territory belonging to the Union Pacific Railroad Company lies upon and mainly within the city of Kansas City, Kansas, and is so situated as to be bounded on

three-fourths (¾) of its boundary line by platted territory of, and adjoining to said city; which said railroad land, by virtue of its location, enjoys the benefits of said city without sharing its burdens; now, therefore,

"*Be it ordained by the Mayor and Councilmen of the City of Kansas City, Kansas:*

"Section 1. That the following described territory, to wit: Commencing at the northeast corner of the southwest quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25) east, in Wyandotte County, Kansas, thence south forty (40) poles, thence east to the Kansas river, thence down the same to the prolongation of the east and west center line of said section fifteen (15), thence west to beginning.

"Also commencing at the northeast corner of the southeast quarter (¼) of section fifteen (15), township eleven (11), range twenty-five (25) east, in Wyandotte County, Kansas, thence west to the center line of said section fifteen (15), thence north eighty (80) poles, thence west fifty-seven (57) poles, thence south to the southerly line of Fifth Street in the original townsite of Armstrong, thence along the southerly line of Fifth Street to its intersection with the southerly line of the Muncie boulevard, thence westerly along the southerly line of the Muncie boulevard to the west line of said section fifteen (15), thence south to the southwest corner of the southwest quarter (¼) of section fifteen (15), thence east eighty (80) poles, thence north fifty-two (52) poles, thence east eighty-five (85) poles, thence north twenty-eight (28) poles, thence east eight (8) poles, thence north one hundred and ninety-nine (199) feet, thence east three hundred and fifty-five and eight-tenths (355.8) feet to the east line of Third Street,

in McAlpine's addition, thence north one hundred and sixty (160) feet, thence east two hundred and seventy-five (275) feet to the center line of Second Street in McAlpine's addition, produced, thence north one hundred and thirty (130) feet, thence east three hundred and fifteen (315) feet to the prolongation of the center line of First Street in McAlpine's addition, thence north one hundred and thirty-two and eight-tenths (132.8) feet, thence east to the east line of section fifteen (15), thence north forty (40) poles to the beginning.

"Also commencing at a point where the northerly line of the Union Pacific Railway Company's right of way intersects the east line of section sixteen (16), township eleven (11), range twenty-five (25) east, in Wyandotte County, Kansas, thence northwesterly along said northerly line of the right of way of the Union Pacific Railway, thence southeasterly along the southerly line of said right of way to the east line of said section sixteen (16), thence north about one hundred (100) feet to the beginning.

"Said tracts being contiguous and containing in the aggregate one hundred and seventy-two (172) acres, and hereby *is* added to and made a part of the city of Kansas City, Kansas.

"Section 2. This ordinance shall take effect and be in force from and after its passage and publication in the Kansas City Gazette.

"Passed in council March 8th, 1892.

William Albright, City Clerk.

"Approved March 11th, 1892.

Thomas F. Hannan, Mayor.

"Published March 11th, 1892."

After the passage of this ordinance the tax levies of the city were extended against the property so attempted to be taken within its limits, and the

receivers of the railway company brought this action for the purpose of enjoining their collection. The collection of the taxes was enjoined, upon the ground that the statute above referred to, under which the ordinance was passed taking the property into the city, was unconstitutional and void, in that it violated that portion of the Fourteenth Amendment to the Constitution of the United States, which provides:

"Nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It was also contended by the receivers of the railway company that the statute was unconstitutional, in that it was in conflict with certain provisions of the State Constitution, which contention is, of course, immaterial in this court. The conflict of the statute with the Constitution of the United States was directly raised in plaintiffs' petition (see record, page 6). The allegations of the petition in respect to this particular matter read as follows:

"And plaintiffs are advised, and so charge the fact to be, that in so far as said statute attempts to authorize the taking of said lands within the limits of Kansas City, Kansas, as attempted in said ordi-

nance, exhibit 'A,' it is unconstitutional, null and void, in this, to wit:

"That by reason of that portion of the act which excepts from its operation any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation, it is in violation of that part of the Fourteenth Amendment to the Constitution of the United States which reads as follows: 'Nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

The defendants filed a general demurrer to the petition of the receivers (see record, page 19). The demurrer was overruled, and the defendants electing to stand upon it, a perpetual injunction was granted in favor of the receivers as prayed for in the petition (see record, page 22). Thereupon the case was taken by the city of Kansas City, Kansas, and the other defendants in the lower court to the Supreme Court of the State of Kansas, where the judgment of the lower court was reversed and an order made directing that Court to sustain the demurrer to the petition. The only question presented to the Supreme Court of Kansas was as to the constitutionality of the statute. That Court held that the law violated neither the Federal nor the State Constitution. The decision of the Supreme Court of Kansas is reported

in volume 53 of the Pacific Reporter, page 468. It may be found on page 30 of the record. The judgment of the Supreme Court of Kansas reversing the case and directing that the lower court should sustain the demurrer to plaintiffs' petition may be found on page 29 of the record.

The Receivers of the Union Pacific Railway Company thereupon brought the case to this Court on a writ of error. The only question which they seek to raise in this Court is, as to whether the statute in question is in violation of the Fourteenth Amendment to the Constitution of the United States. That question is directly raised in their several assignments of error, which may be found on page 38 of the record. The same errors are assigned in this brief, and are as follows:

Errors Assigned.

First. The Supreme Court of the State of Kansas erred in reversing the judgment of the lower court.

Second. The Supreme Court of the State of Kansas erred in failing and refusing to affirm the judgment of the lower court.

Third. The Supreme Court of the State of Kansas erred in holding that these plaintiffs in error could not complain of the fact that chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class, and the adding thereto certain adjoining territory," was in violation of that part of the Fourteenth Amendment to the Federal Constitution which reads as follows: "Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Fourth. The Supreme Court of the State of Kansas erred in failing and refusing to hold that chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class, and the adding thereto certain adjoining territory," was in violation of that part of the Fourteenth Amendment to the Federal Constitution which reads as follows: "Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Fifth. The Supreme Court of the State of Kan-

sas erred in refusing to hold that the exception contained in chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class, and the adding thereto certain adjoining territory," did not bring said act within the inhibition of that part of the Fourteenth Amendment to the Federal Constitution which reads as follows: "Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," the exception in said statute herein referred to being as follows:

"But nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation."

Sixth. The Supreme Court of the State of Kansas erred in holding that said chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class, and the adding thereto certain adjoining territory," was and is valid, in so far as these plaintiffs in error are concerned, and binding upon them.

Seventh. The Supreme Court of the State of Kansas erred in holding that the action of the city

of Kansas City in taking within its limits the property of the Union Pacific Railway Company, under the provisions of chapter 74 of the Session Laws of Kansas for 1891, being an act entitled "An act relating to certain cities of the first class, and the adding thereto certain adjoining territory," was legal, and that the tax levies of said city and of the Board of Education of said city, extended against said property, were valid.

ARGUMENT.

Chapter 74 of the Session Laws of Kansas for 1891 is Unconstitutional and Void, for the Reason that it Arbitrarily Excludes from its Operation Agricultural Lands Owned by Individuals, and Includes all Other Classes of Property.

The act in question is vitiated by the exception found in the last part of section 15, as the same appears on page 339, volume 1, General Statutes of Kansas, 1897, which reads as follows:

"*But nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation.*"

This provision of the act means that agricultural lands, *when owned by individuals*, shall not be subject to its provisions.

The statute under consideration, therefore, divides property into two general classes, one of which is subject to its provisions and the other is not. In the one class comes agricultural lands owned by individuals. In the other class comes agricultural lands owned by corporations, lands

used for manufacturing and railroad purposes, vacant lands held for speculative purposes; in short, all lands not included in the excepted class.

The law is void because it arbitrarily singles out agricultural lands *owned by individuals* and exempts them from burdens imposed upon all other classes of property.

The discrimination thus made is obvious. A corporation owns a tract of land used for agricultural purposes, located in the vicinity of a city of the first class. This land is subject to the provisions of the act and may be taken within the confines of the city. An individual owns a tract of land used for agricultural purposes, located precisely similar to the tract owned by the corporation, but such land is not subject to the provisions of the act and can not be taken into the city. The individual sells his land to the corporation and it becomes subject to the law. The corporation sells its land to the individual and the law no longer applies.

Again, an individual owns several hundred acres of land, situated near a city of the first class; it is vacant and unoccupied, and of such a character that it is not suitable for agricultural purposes. The owner holds it with the expectation that it

may become valuable for manufacturing or other similar purposes. This land may be taken into the city. Another individual owns an acre of ground similarly situated, but used for agricultural purposes.' His land can not be taken into the city.

Another illustration: John Jones owns a tract of land consisting of two hundred acres, located adjacent to a city of the first class, which is used in the manufacture of brick. He selected this spot because it was not included within the limits of the city and close enough thereto to enable him to successfully carry on his business. He has no desire to have his property incorporated within the limits of the city. In fact, if that should be done the added burdens of taxation would make it impossible for him to successfully carry on his brick business in that location, and he would be compelled in self-protection to seek another situation. Under the provisions of the act in question, his property might be taken within the limits of the city by the mere passage of an ordinance, regardless of his protests. On the other hand, Peter Smith might own a small parcel of land similarly situated,of less than an acre in extent, upon which he raised a few vegetables each year, but his land could not be taken into the city under the act in

question, simply because it was used for agricultural purposes.

A railroad company may also own large tracts of unoccupied land located in the neighborhood of a city of the first class. The land may be held in anticipation of the growing needs of the company. This property can be brought into the city over the protests of its owner, while a plat of ground 100 feet square used for agricultural purposes may remain outside.

No good reason can be given for these discriminations. They result entirely from the exercise of arbitrary power upon the part of the Legislature.

The Discrimination is Substantial.

That the discrimination is substantial is apparent. Property located within the limits of a city is subject to additional taxation for the support of the city government; to special assessments for the construction of sewers and the paving of streets; to the law of eminent domain as exercised by cities of the first class, and to that portion of such law which provides for the assessment of damages and benefits for the purpose of opening and improving streets; to the various police regu-

lations which may be imposed by a city, which may prevent the free use of one's property. For instance, a regulation such as exists in the city of Leavenworth, which prevents trains from running at a speed exceeding three miles per hour.

It is true that there are benefits which are supposed to flow from the location of property within the boundaries of a city, and many owners would prefer to have their property located within rather than without a city. But the fact nevertheless remains that the bringing of a piece of real estate within the confines of a city carries with it onerous burdens which many property owners are anxious to avoid. The statute under consideration recognizes this fact by giving to owners of certain classes of property the right to protest against the annexation as well as the right to have the question as to whether the property shall be taken into the city judicially determined in the district court.

The Power of the Legislature to Make Classifications.

It is urged, however, that the exception made in favor of agricultural property owned by individuals does not make the act void, because the

Legislature has the power to make classifications; that when an act applies equally to all persons or properties included within the various classifications made by it, the legislation is valid.

The Classifications Must be Reasonable.

We concede that the Legislature has the power to make classifications and that it may have the power to classify the different kinds of property which may be taken within the limits of a city; but such classification must be reasonable. It can not be purely arbitrary. For instance, the Legislature would have no right to say that all tracts of land owned by individuals named Jones could be taken within the limits of an adjoining city but that this could not be done with tracts of land similarly situated and owned by individuals named Smith. The Legislature would have no power to authorize a city to collect a license tax from all red-headed men engaged in business within its limits, exempting at the same time men with different colored hair. This idea is very lucidly set forth by Mr. Justice Brewer in the case of *Gulf, etc., Rld. Co. vs. Ellis*, 165 U. S. 155, and we use his language:

"But it is said that it is not within the scope of

the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, yet it is equally true that such classification can not be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

"As well said by Black, J., in *State vs. Loomis*, 115 Missouri, 307, 314, in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employés any order, check, etc., payable otherwise than in lawful money of the United States, unless negotiable and redeemable at its face value in cash or in goods and supplies at the option of the holder at the store or other place of business of the corporation, was held class legislation and void. 'Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations.

Thus the Legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such purpose would be arbitrary and a piece of legislative despotism and therefore not the law of the land.'

"In *Vanzant vs. Waddell*, 2 Yerger, 260, 270, Catron, J. (afterwards Mr. Justice Catron of this court), speaking for the Supreme Court of Tennessee, declared: 'Every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another.'

"In *Dibrell vs. Morris' Heirs*, Supreme Court of Tennessee, 15 S. W. Rep. 87, 95, Baxter, Special Judge, reviewing at some length cases of classification, closes the review with these words: 'We conclude,upon a review of the cases referred to above, that, whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural and not arbitrary.'"

Judge Cooley's opinion upon this subject as expressed in his work on Constitutional Limitations, page 393, is as follows:

"The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their

rights, priviliges or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects should be based upon some reason which renders them important—like the want of capacity in infants and insane persons; but if the Legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even if it did not come in conflict with express constitutional provisions. The man or the class forbidden the acquisition or enjoyment of property in the manner permitted to the community at large would be deprived of *liberty* in particulars of primary importance to his or their 'pursuit of happiness.'"

The Classification Made, of Agricultural Lands Owned by Individuals, is Unreasonable and Arbitrary.

We may admit, for the sake of argument, that sufficient reasons exist to justify the Legislature in exempting lands used for agricultural purposes from statutes providing for the enlargement of city boundaries. Furthermore, that the discrimination in favor of agricultural lands in the act under consideration would have been perfectly valid pro-

vided all agricultural lands had been excepted. But the trouble with the exception is that it only includes agricultural lands owned by individuals. The Legislature saw no objections to including agricultural lands within the limits of a city of the first class. The act expressly provides that such lands may be taken within the limits of a city provided they are owned by corporations. It is only when the agricultural lands are owned by individuals that the exception applies. This demonstrates that the mere fact of the lands being used for agricultural purposes affords no good reason, in the estimation of the Legislature, for excluding them from cities of the first class.

How can the conclusion be avoided, then, that the classification sought to be made in favor of agricultural lands owned by individuals is a purely arbitrary one? It has no reasonble basis to stand upon. The Legislature might just as well have said that all land belonging to John Doe should be excepted from the provisions of the act, or that all tracts of land having a red school house in the southeast corner and a white church in the northwest corner should not be affected by it. As to whether the exception is to apply to agricultural lands or not, depends upon the question of owner-

ship. Individuals owning such lands are favored; corporations owning similar lands are discriminated against. Therefore, the classification sought to be made is arbitrary, and not within the constitutional power of the Legislature.

In the case of *Santa Clara County vs. Southern Pac. Ry. Co.*, 18 Federal Reporter, 385, opinion by Mr. Justice Field, a statute of the State of California was condemned because it distinguished between corporations and individuals as to the uniformity of taxation. In the course of the opinion (page 394), Justice Field used the following language, which we desire to adopt as a part of our argument in this connection:

"Instances of every day occurrence will show the effect of this discrimination in a clear light. A natural person and a railroad company own together a parcel of property in equal proportions, subject to a mortgage. In estimating the value of the undivided half belonging to the natural person, half of the amount of the mortgage is deducted. In estimating the value of the undivided half belonging to the railroad company, no part of the mortgage is deducted. *The discrimination is made against the company for no other reason than its ownership.* Take another instance: A natural person and a railroad company own tracts of land adjoining each other, of the same quantity, and of equal fertility and richness, both being subject to a mortgage. In the estimate of the value of the property belonging to the natural person the

amount of the mortgage is deducted; in the estimate of the value of the property belonging to the railroad company the mortgage is not deducted. Of course, the valuation of the latter and consequent tax is proportionately increased, *and this discrimination is made solely because of the ownership of the property.* Should these two owners exchange their lands, the valuation made would change with the ownership. Should the railroad company sell its tract to an individual, the assessing officers would at once be bound to return a different valuation of the property as a basis for taxation. *Everyone sees that the valuation has not in fact changed with the ownership, and therefore that the discrimination is made solely because a rule is adopted in the assessment of the property of one party different from that applied in the assessment of the property of the other, purely on account of its ownership.* * * *

"The principle which sanctions the elimination of one element in assessing the value of property held by one party, and takes it into consideration in assessing the value of property held by another party, would sanction the assessment of the property of one at less than its value—at a half or a quarter of it—and the property of another at more than its value—at double or treble of it—according to the will or caprice of the State. *To-day railroad companies are under its ban, and the discrimination is against their property. To-morrow it may be that other institutions will incur its displeasure.* If the property of railroad companies may be thus sought out and subjected to discriminating taxation, so, at the will of the State, by a change of its Constitution, may the property of churches, of universities, of asylums, of savings banks, of insurance companies, of rolling and flouring mill companies, of mining companies, in-

deed, of any corporate companies existing in the State. The principle which justifies such a discrimination in assessment and taxation, where one of the owners is a railroad corporation and the other a natural person, would also sustain it where both owners are natural persons. A mere change in the State Constitution would effect this if the Federal Constitution does not forbid it. *Any difference between the owners, whether of age, color, race or sex which the State might designate, would be a sufficient reason for the discrimination.* It would be a singular comment upon the weakness and character of our republican institutions if the valuation and consequent taxation of property could vary according as the owner is white, or black, or yellow, or old, or young, or male or female. A classification of values for taxation upon any such ground would be abhorent to all notions of equality of right among men. Strangely, indeed, would the law sound in case it read that in the assessment and taxation of property a deduction should be made for mortgages thereon if the property be owned by white men or by old men, and not deducted if owned by black men or by young men; deducted if owned by landsmen, not deducted if owned by sailors; deducted if owned by married men, not deducted if owned by bachelors; deducted if owned by men doing business alone, not deducted if owned by men doing business in partnerships or other associations; deducted if owned by trading corporations, not deducted if owned by churches or universities, and so on, making a discrimination whenever there was any difference in the character or pursuit or condition of the owner. To levy taxes upon a valuation of property thus made is of the very essence of tyranny, and has never been done except by bad governments in evil times, exercising arbitrary and despotic power."

We contend that the discrimination made in favor of agricultural lands owned by individuals and against all other classes of property brings the act within the inhibitions of the Federal Constitution, unless the discrimination was one which the Legislature was authorized to make; that the discrimination was not within the limits of legislative discretion, because it is based entirely upon the question of the ownership of the property; that whether property happens to be owned by a corporation or by an individual, affords no proper basis for exempting that property from the operation of laws which affect all other classes of property similarly situated; therefore, as the discrimination was not a proper one, that the law is unconstitutional and void.

"Due Process of Law" and "The Equal Protection of the Laws."

It was to prevent discriminations and class legislation that the latter part of the Fourteenth Amendment to the Federal Constitution was passed. The words, "Due process of law" and "The equal protection of the laws," had for centuries possessed a well known signification which

became a part of the Constitution. They are synonymous with "The law of the land." They mean a law binding upon every member of the community under similar circumstances (*Wally's Heirs vs. Kennedy*, 2 Yerg. 554). They were intended to secure the individual from the arbitrary exercise of the powers of the government, unrestrained by the established principles of private rights and distributive justice (*Bank vs. Okely*, 4 Wheat. 235). They condemn arbitrary, unequal and partial legislation (*State vs. Loomis*, 115 Mo. 307, 22 S. W. 351). They meant not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances (Mr. Justice Field in *County of Santa Clara vs. Rld. Co.*, 18 Fed. Rep. 398). The Fourteenth Amendment "suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by others" (*Ex parte* Virginia, 100 U. S. 339).

"The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every partial or private law which directly proposes to destroy or

affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise odious individuals and corporations would be governed by one law, the mass of the community, and those who made the law, by another; whereas the like general law, affecting the whole community equally, could not have been passed. The idea of people, through their representatives, making laws whereby are swept away the life, liberty and property of one or a few citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name. Such abuses resulted in the adoption of the Magna Charta in England, which is, and for centuries has been, the foundation of English liberty. Its infraction was a leading cause why we separated from that country, and its value as a fundamental rule for the protection of the citizen against legislative usurpation was the reason of its adoption as a part of our Constitution."

Judge Catron in *Wally vs. Kennedy*, 2 Yerg. 555, and *Vanzant vs. Waddell*, id. 270.

Cases in which Statutes have been Held Void on Account of Making Arbitrary and Unreasonable Classifications.

The cases in which discriminations are condemned and the statutes containing them declared unconstitutional are numerous, and we will call the attention of the court to some of them:

In the case of *Gulf, Colorado & Santa Fe Ry. vs. Ellis*, 165 U. S. 150, an act of the State of Texas providing for the assessment of attorneys' fees in suits against railroad companies, arising upon claims for stock killed or injured, was held to be unconstitutional in that it singled out railroad companies and required them to pay such fees without compelling other corporations and individuals to pay them under similar circumstances.

In the case of *Low vs. Rees*, 41 Neb. 127, 59 N. W. 362, an act of the Nebraska Legislature fixing eight hours as a day's labor for all classes of mechanics, servants and laborers, excepting those engaged in farm or domestic labor, was declared unconstitutional, first, by reason of the exception made in favor of farm and domestic labor, and second, because it interfered with the right to contract.

In the case of *State vs. Loomis*, 115 Mo. 307, 22 S. W. 350, an act of the Missouri Legislature which declared that all corporations or individuals engaged in manufacturing or mining should pay their employés in cash or the equivalent thereof, was held unconstitutional for the reason that it related only to persons engaged in manufacturing or

mining enterprises, and had no application to persons engaged in other classes of business.

In the case of *State vs. Goodwill*, 33 W. Va. 179, 10 S. E. 285, the Supreme Court of West Virginia held that it was not competent for the Legislature under the Constitution to single out owners and operators of mines and manufacturers of every kind, and provide that they should bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it was competent for other owners of property or employers of labor to make.

In the case of *Millett vs. People*, 117 Ill. 294, 7 N. E. 631, the Supreme Court of Illinois stated that the question involved therein was this:

"The question is thus presented whether it is competent for the general assembly to single out owners of coal mines as a distinct class and provide that they shall bear burdens not imposed on other owners of property or employers of laborers, and prohibit them from making contracts which it is competent for other owners of property or employers of laborers to make."

The court then proceeded to answer the question in the negative.

In the case of *O'Connell vs. Menominee Bay Shore Lumber Co.*, 71 N. W. 449, it was held by

the Supreme Court of Michigan that a statute which permitted the service of process in certain classes of cases in counties adjoining the one in which the action was brought was invalid, because class legislation in that it gave special privileges to suitors on specified classes of claims.

In the case of *Coal Co. vs. Rosser*, 53 Ohio St. 12, it was held that a statute providing for an attorney's fee *in actions for wages* was unconstitutional and void as being class legislation.

In the case of *City of Tacoma vs. Krech*, 15 Wash. 296, 46 Pac. 255, an ordinance prohibiting barbers from working on Sunday was declared void upon the ground that barbers were singled out and other persons exempted from its provisions.

In the case of *Janesville vs. Carpenter*, 77 Wis. 288, a statute authorizing suits for injunction to be maintained in favor of certain parties under circumstances differing from those which obtained in respect to all other suits of a similar nature, was held to be void as discriminating and class legislation.

In *Lewis vs. Webb*, 3 Greenl. 326, the validity of a statute granting an appeal from a decree of

the probate court in a particular case came under review. The court says:

"On principle it can never be within the bounds of legitimate legislation to enact a special law, or pass a resolve dispensing with the general law in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation. Such a law is neither just nor reasonable in its consequences. It is our boast that we live under a government of laws, and not of men; but this can hardly be deemed a blessing, unless those laws have for their immovable basis the great principles of constitutional equality. Can it be supposed for a moment that if the Legislature should pass a general law, and add a section by way of proviso that it never should be construed to have any operation or effect upon the persons, rights, or property of Archelaus Lewis or John Gordon, such a proviso would receive the sanction or even the countenance of a court of law? And how does the supposed case differ from the present? A resolve passed after the general law can produce only the same effect as such proviso. In fact, neither can have any legal operation."

See also:

South & North Alabama Rld. vs. Morris, 64 Ala. 193, 199.

Chicago, St. L., etc., Rld. vs. Moss, 60 Miss. 641.

Wilder vs. Rld. Co., 70 Mich. 382.

Grand Rapids Chair Co. vs. Runnels, 77 Mich. 104.

Joliffe vs. Brown, 14 Wash. 155.

San Antonio, etc., Ry. Co. vs. Wilson, (Tex.) 19 S. W. 910.

Atchison & Nebraska Rld. Co. vs. Baty, 6 Neb. 37.

Eden vs. People, 161 Ill. 296.

Froer vs. People, 141 Ill. 171.

Pearson vs. Portland, 69 Me. 278.

The Decision of the Kansas Supreme Court.

The Supreme Court of Kansas held that the law was not in conflict with the Fourteenth Amendment, upon the ground, first, that the Legislature in passing laws providing for the addition of territory to cities of the first class had the right to discriminate between different classes of property and could exclude agricultural lands from the operation thereof, while including all the other classes of property "having to the city like relations of situation, contiguity and otherwise." Second, that the discrimination made between individuals and corporations as the owners of agricultural lands was one which could only be taken advantage of by corporations owning agricultural lands. Therefore, that the plaintiffs could not be heard to complain of such discrimination, because

it was not alleged in the petition that the lands of the Union Pacific Railway Company were used for agricultural purposes. Let us consider the arguments of the court upon these propositions.

First. As to the discrimination made by the statute between different classes of property.

We do not assent to the view that the Legislature has the power to make general laws with respect to extending the boundaries of cities, and to exclude from the operation of such laws lands used for agricultural purposes, without reference to their size or extent, when such lands are in all respects similar to lands affected by the law, with the single exception that they are used for agricultural purposes. Under this aspect of the law, as soon as the use of the land changes, the application of the law changes with it. A piece of land occupied to-day with a dozen families who are engaged in tilling it, is exempt from the provisions of the statute. To-morrow the same piece of land is abandoned and becomes entirely unoccupied, is no longer devoted to agricultural purposes, and is at once brought within the purview of the law. We can not believe that such discrimination is justifiable. But, conceding that it is, and that the views of the learned Chief Justice of the Supreme

Court of Kansas who delivered the opinion of the court are correct upon this subject, still he fails to meet the precise point in issue. That point is, not whether the Legislature can discriminate between agricultural lands and all other classes of property similarly situated, but whether it can discriminate between agricultural lands *owned by individuals* and all other classes of property.

The reasons which might justify the Legislature in excluding agricultural lands from the operation of the law do not apply when the act itself *includes* agricultural lands. If the Legislature had been actuated by the reasons offered by the Supreme Court of Kansas in support of the discrimination made, the act would have excluded from its operations *all* agricultural lands. Agricultural lands owned by corporations must come in. Agricultural lands owned by individuals may stay out. The mere fact that the lands are used for agricultural purposes affords no objection to their being taken into a city. The objection only arises when such lands are owned by individuals. Is such a discrimination valid? We insist that it is not, and that the owners of property discriminated against have the right to call to their aid the provisions of the Federal Constitution to protect themselves

against a legislative enactment which refuses to them the equal protection of the laws, and which permits their property to be taken without due process of law.

Second. As to the right of plaintiffs in error to avail themselves of the discrimination made in favor of agricultural lands owned by individuals, and against all other classes of property.

The Supreme Court of Kansas held that plaintiffs in error were not in a position to avail themselves of the unconstitutionality of the act caused by the discrimination made in favor of agricultural lands owned by individuals. In support of its position the Court cites Cooley on Constitutional Limitations (6th ed.), page 196. The law is there stated to be as follows:

"A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has, therefore, no interest in defeating it."

But in this case the rights of the Union Pacific Railway Company are affected by the act complained of. Its lands are sought to be taken within the limits of a city and subjected to its burdens under the provisions of the very statute which

we say is unconstitutional. The argument of the lower court necessarily assumes that the statute is unconstitutional by reason of the exception made between individuals and corporations owning agricultural lands, and holds that the railway company can not raise the question as to the constitutionality of the statute because its lands are not agricultural lands.

Here we have the anomalous position of a party whose rights are injuriously affected by a statute confessedly void, but who is not permitted to even call the court's attention to the invalidity of the act. We have the case of a court enforcing, over a party's protest, the provisions of a law *which it concedes is not a law.*

The question first to be determined is, whether or not the law is in violation of the Federal Constitution. If it is, it is void and of no effect. If it is a void law it should not be given effect by any court; it should not be enforced against any person. It would be strange, indeed, if a void law could be enforced as to some persons injuriously affected by it, and not enforced as to others.

The Supreme Court of Kansas holds that the party complaining must be affected by the *discrimination* as well as by the statute. But the

property of the Union Pacific Railway Company *is* affected by the discrimination as well as by the statute. Suppose the distinction had simply been made between property used for agricultural purposes on the one hand, and all other classes of property on the other. Waiving any question as to the validity of such a discrimination, can it be said that the owner of property used for railroad purposes would not be *affected* by it? In other words, if the discrimination in favor of agricultural lands made the statute unconstitutional, would not railroad lands be *affected* by the act so as to enable the owner thereof (within the doctrine of the Supreme Court of Kansas) to plead and rely upon its unconstitutionality? If that is so, what, if anything, is there to prevent the owner of railroad property from assailing the validity of an act which is unconstitutional, because of a discrimination made in favor of agricultural lands *owned by individuals*, and against all other classes of property?

A demonstration of the fact that property held or used for railroad purposes is affected by the discrimination, is afforded by considering the practical workings of this law as to the lands described in the first paragraph of the act. It starts out by

describing, first, unplatted lands which lie upon or mainly within a city of the first class; second, unplatted lands so situated as to be bounded on three-fourths of its boundary line by platted territory of or adjacent to said city, or by the boundary line of such city, or by both. Such lands may be taken into the city by the mere passage of an ordinance; provided, however, they do not happen to be owned by an individual and used for agricultural purposes. The lands of the railway company are included within those enumerated in the statute, and by ordinance duly passed are brought within the city. So far the conclusion can not be avoided that the lands of the Union Pacific Railway Company have been affected by the statute.

Let us go a little farther. John Jones owns an unplatted tract of land which lies upon and mainly within the city of Kansas City. It is also so located as to be bounded on three-fourths of its boundary line by platted territory of that city, and by three-fourths of the boundary line thereof. The land is used for agricultural purposes. The city desires to include this tract of land within its boundaries, but can not do it. An examination of the statute reveals the fact that lands owned by an individual and used for agricultural purposes

are not affected by it. Here, then, is an exemption of the land owned by John Jones from the provisions of the statute. The lands of the railroad company are taken into the city. The land owned by John Jones, although located precisely similar to that of the railway company, can not be touched. Does not this amount to a discrimination in favor of John Jones and against the railway company? And can it be said that the railroad company is not affected by the discrimination?

The Clause Excepting Agricultural Lands Owned by Individuals Can Not be Rejected, Leaving the Statute to Stand Without it. The Whole Act Must Fall.

It may be claimed that the exception should be disregarded and thus permit the act to stand. This can not be done without making a law which it was not the intention of the Legislature to pass. The whole act is made dependent upon the idea that it was not to affect agricultural lands owned by individuals. The act never would have passed the Legislature if such lands had been included. The exception was undoubtedly in the shape of an amendment offered by some member who was

seeking to protect the property of himself and his fellow farmers. The probabilities are that an amendment of this nature, which is so much out of harmony with the balance of the act, would never have been accepted by the friends of the measure if they had not been compelled to do so. The exception, however, is there, and is so connected with the whole statute as to be inseparable from it. This being so, the whole statute must fall.

In the case of *Spraigue vs. Thompson*, 118 U. S. 90, a decision was made involving this precise question. In that case it appears that the Code of Georgia contained the following provision:

"Any person, master, or commander of a ship or vessel bearing toward any of the ports or harbors of this State, *except coasters in this State, and between the ports of this State and those of South Carolina, and between the ports of this State and those of Florida*, who refuses to receive a pilot on board, shall be liable, on his arrival in such port in this State, to pay the first pilot who may have offered his services outside the bar and exhibited his license as a pilot, if demanded by the master, the full rates of pilotage established by law for such vessel."

It was held by this Court that this provision of the Georgia Code was in conflict with the Constitution of the United States and that it was annulled

and abrogated by the provision in the Revised Statutes, section 4237, which provides that—

"No regulations or provisions shall be adopted by any State which shall make any discrimination in the rate of pilotage or half-pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States; and all existing regulations or provisions making any such discriminations are annulled and abrogated."

The Georgia statute was declared void because it excepted from its operation coasters in the State of Georgia and coasters between the ports of Georgia and those of South Carolina and between the ports of Georgia and those of Florida. It was held, however, by the Supreme Court of Georgia, in the same case of *Spraigue vs. Thompson* that so much of the section as made these illegal exceptions might be disregarded, so that the rest of the section as thus read might stand, upon the principle that the separable part of the statute which is unconstitutional may be rejected and the remainder preserved and enforced. But in reference to this decision of the Supreme Court of Georgia, this court, through Mr. Justice Matthews, decided as follows:

"But the insuperable difficulty with the applica-

tion of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions. We are, therefore, constrained to hold that the provisions of Sec. 1512 of the Code of Georgia can not be separated so as to reject the unconstitutional exceptions merely, and that the whole section must be treated as annulled and abrogated by Sec. 4237 of the Revised Statutes."

In the case of *Pollock vs. Farmers Loan & Trust Co.* (Income Tax Case), 158 U. S. 601, it was held by this Court that so much of the sections of the income tax law as laid a tax on income from real and personal property was unconstitutional. The Court then proceeded to discuss the question as to whether these particular sections could be eliminated from the statute so that the balance of it might stand. In reference to that matter, this Court, through Mr. Chief Justice Fuller, stated the law to be as follows (page 635):

"It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected. And in the case before us there is no question as

to the validity of this act, except sections twenty-seven to thirty-seven, inclusive, which relate to the subject which has been under discussion; and as to them we think the rule laid down by Chief Justice Shaw in *Warren vs. Charlestown*, 2 Gray, 84, is applicable, that if the different parts 'are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant a belief that the Legislature intended them as a whole, and that, if all could not be carried into effect, the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected must fall with them.' Or, as the point is put by Mr. Justice Matthews in *Poindexter vs. Greenhow*, 114 U. S. 270, 304: 'It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact."

An illustration of this same principle is found in the Trade Mark Cases, 100 U. S. 82, where an act of Congress, which, it was claimed, would have been valid as a regulation of commerce with foreign nations and among the States, was held to be void altogether because it embraced all com-

merce, including that between the citizens of the same State, which was not within the jurisdiction of Congress, and its language could not be restrained to that which was subject to the control of Congress. "If we should," said the Court in that case, page 99, "in the case before us undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do."

See also opinion of Mr. Justice Brewer in case of *C. B. U. P. R. R. Co. vs. A. T. & S. F. R. Co.*, 28 Kas. 454.

Warren et al. vs. Mayor, etc., 2 Gray, 84.

Slauson vs. City of Racine, 13 Wis. 398.

Cooley's Constitutional Limitations, page 179.

Mesheimer vs. The State, 11 Ind. 482.

The Right of the Union Pacific Railway Company to Hold Lands Used for Agricultural Purposes.

It was urged with considerable force by adverse counsel in the court below that the Union Pacific Railway Company had no authority to hold lands used for agricultural purposes; from which premise it was sought to deduce the conclusion that

the plaintiffs could by no possibility be injured by the discrimination made in the statute between the owners of agricultural lands. In view of the argument already made this point would not seem to be very material, but it is so far from being in accordance with the law that we can not refrain from calling the Court's attention to its incorrectness. Any railroad company is liable to have a surplus of ground which it holds for the necessities of a growing business. There is no reason why the company may not lease these lands to be used for agricultural purposes. Even though the railroad company may be holding more land than it should, its title to the land can not be disturbed except in a direct proceeding brought at the instance of the State. As long as the State does not interfere, the railroad company has the right to permit the use of its surplus lands for agricultural purposes.

Conceding that railroad companies generally have no right to permit their surplus lands to be used for agricultural purposes under any circumstances, still this rule could not be held to apply to the Union Pacific Railway Company, for this reason: The Union Pacific Company was granted large tracts of lands by the United States to aid in

the construction of its railroad; it still owns many acres of these lands. They are valuable, principally for agricultural purposes. In the disposition and management of this property it was essential that the company not only permit but encourage their use for agricultural purposes. In most instances the title to the property sold remained in the railway company until the purchase price was fully paid. In many cases, after the property was sold, it reverted to the railway company by reason of a failure to pay balances due on the purchase price. The company would thereupon lease the land and improvements until another purchaser could be found. All of this must have been within the contemplation of Congress when the grant of lands was made to the railway company, and the company was necessarily endowed with the powers which were essential to carry the terms of the grant into effect. As was said by this Court in the case of *Platt vs. Union Pacific Railroad Company*, 99 U. S. 58:

"Railroad companies are not usually empowered to hold lands other than those needed for roadway and stations or water privileges. But when they are authorized to acquire and hold lands separate from their roads, the authority must include the ordinary incidents of ownership—the right to sell or to mortgage. Especially is this so when, as in

the present case, the lands have been granted to the company by the Legislature that granted the charter, *without any restriction of their use.*"

Respectfully submitted.

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No. 402.
Sup. Ct. Brf. of Pierce & Williams
for P. & C.

DEC 14 1898
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

Filed Dec. 14, 1898.

OCTOBER TERM, 1898.

No. 402.

S. H. H. CLARK ET AL., RECEIVERS, PLAINTIFFS IN ERROR,

vs.

THE CITY OF KANSAS CITY, KANSAS, ET AL.

SUPPLEMENTAL BRIEF FOR THE PLAINTIFFS IN ERROR.

WINSLOW S. PIERCE,
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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 12-13-'98

IN THE

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SUPPLEMENTAL BRIEF FOR THE PLAINTIFFS IN ERROR.

It is claimed by the city that the judgment of the supreme court directing that the demurrer be sustained was proper, inasmuch as the petition fails to show that the taxes conceded to be legal were paid, etc.

No question of this kind was passed upon by the supreme court of the State, nor was such a question raised there.

The question may arise as to whether the opinion of the supreme court is properly a part of the record, so that it may be consulted for the purpose of determining what the State court actually passed upon.

It is decided in England *vs.* Gebhart, 112 U. S., 502, that the opinion of the State supreme court is not a part of the record, even though returned with the writ of error in accordance with the rules. However, in the case of Cousin *vs.* Labattut, 19 How., 202, it was held that when the statutes of a State make the opinion of the supreme court a part of the record the Supreme Court of the United States will consult the opinion of the State court to determine the points decided by it. (See, also, N. O. Water Co. *vs.* La. Sugar Co., 125 U. S., 27. See particularly case of Gross *vs.* U. S. Mtg. Co., 108 U. S., 484.)

Section 21, page 23, Compiled Laws of Kansas for 1897, reads as follows:

"It shall be the duty of the judges of the supreme court to prepare and file with the papers in each case full notes of the opinion of the court upon the questions of law arising in the case, within 60 days after the decision of the same; and the opinion so filed, shall be treated as a part of the record in the case, but no costs shall be charged therefor, except for copies thereof ordered by a party; and no mandate shall be sent to the court below until the opinion provided for by this section has been filed."

DECISION FINAL.

It is claimed that the decision of the supreme court is not final so as to authorize an appeal to the Supreme Court of the United States.

The statute about amendment to a petition upon the sustaining of a demurrer reads as follows (sec. 141, p. 133, Gen. Stat. 1897):

"If a demurrer be sustained, the adverse party may amend, *if the defect can be remedied by way of amendment*, with or without costs, as the court in its discretion shall direct."

It is not possible for an amendment to be made which could make effective the causes of action upon which the receivers relied. Any amendment which would state a cause of action raising other than the constitutional questions involved, would amount to the bringing of a new case. Furthermore, such a cause would be barred by the five-year statute of limitations, as the taxes enjoined were due November 1, 1893.

The Wyler case is instructive upon this point; it is reported in 158 U. S., 285.

The Kansas statute permits suits to enjoin taxes. (See section 263, page 165, Statutes of 1887.)

In the city's brief, filed in the State supreme court, it stated:

"The only question involved in this proceeding in error is the constitutionality of chapter 74 of the Session Laws of Kansas for 1891, page 1."

See also the cases of Mower *vs.* Fletcher, 114 U. S., 127 and Tippecanoe County *vs.* Lucas, 93 U. S., 108. For additional authorities upon the question, see Bostwick *vs.* Brinkerhoff, 106 U. S., 3; Atherton *vs.* Fowler, 91 U. S.; *Ex parte* Norton, 108 U. S., 237.

The collection of the taxes was enjoined solely upon the ground that the statute under which the property was taken into the city was unconstitutional, being in violation of the fourteenth amendment to the Federal Constitution, and also being in violation of the State constitution. The defendants filed a demurrer to our petition; the demurrer was overruled, and the defendants having elected to stand upon it and not plead, final judgment was rendered in our favor and against the defendants. The case was taken to the supreme court by the city of Kansas City. The supreme court reversed the case, and in the opinion the following language was used:

"The judgment of the lower court was wrong. It is reversed, with directions to sustain the demurrer to the petition."

When the demurrer to the petition is sustained by the lower court in accordance with the mandate of the supreme court, judgment will necessarily have to be entered in favor of the defendants below. It is true, we would have a right to amend our petition under the statute, if there were any new facts which could be pleaded. But there is nothing in the record to show that the receivers have any intention of amending the petition or that there are any additional facts which could possibly be set up by amendment.

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A. L. WILLIAMS,
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Counsel for Plaintiffs in Error.

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IN THE

UNITED STATES SUPREME COURT.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. DOANE AND F. R. COUDERT, AS RECEIVERS OF THE UNION PACIFIC RAILWAY COMPANY,

Plaintiffs in Error,

vs.

THE CITY OF KANSAS CITY, KANSAS, et al.,

Defendants in Error.

BRIEF OF DEFENDANT IN ERROR

Kansas City, Kansas, is a city of the first class, having a population of over 30,000. It was formed by a consolidation of three cities situated so that lines drawn connecting them form a triangle. Situated at a point almost in the center of this triangle, the Union Pacific Railway Company owned three tracts of land, aggregating about 170 acres, used in part for shops and other railway purposes and in part vacant. This land situated almost in the center of the city was attempted to be taken into the corporate limits in 1887, but the company appealed and the Supreme Court of Kansas in 1889 held that under the then existing laws the city could not take the Union Pacific lands into the city against the protest of the company.

U. P. Ry. Co. vs. Kansas City, 42 Kansas, 497.

At the session of the Kansas legislature in 1891 the law given in full in the brief of plaintiff in error, page 2, was passed, providing a way to take property into cities of the first class and repealed the former law, under which Kansas City had made its first attempt to incorporate the Union Pacific lands as part of the municipality. In 1892 Kansas City, again attempted to take the Union Pacific lands into the city, resulting in the instituting of the present suit, in the State Court, calling in question the law of 1891, both as being in conflict with the State and Federal Constitutions.

Before entering on a discussion of the merits of this appeal we desire to present a question as to the jurisdiction of this court.

Judgment appealed from is not a final judgment or order, and is not reviewable in this court.

The defendants, The City of Kansas City, The County Treasurer and County Clerk of Wyandotte County and the Board of Education of the City of Kansas City, demurred to the petition in the Court of Common Pleas of Wyandotte County, Kansas, on the ground that the petition did not state facts sufficient to constitute a cause of action. The defendants, the Township of Wyandotte and School District No. 9, failed to answer or plead at any time, or in any way, to the petition of the plaintiffs. The Court of Common Pleas overruled the demurrer filed by the defendants above named, and thereupon said defendants elected to stand on their demurrer (page 29 of record), and appealed from said ruling to the Supreme Court of the State of Kansas, which court made the following order:

"This case comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be reversed, and that this case be remanded with instructions to sustain the demurrer to the petition. It is further ordered that the defendants in error pay the costs of this case in this court taxed at $....., and hereof let execution issue."

At the close of the opinion of the Supreme Court, delivered by Doster, C. J., it is said:

"The judgment of the court below was wrong, it is reversed with directions to sustain the demurrer to the petition."

From the above order and judgment, directing the Court of Common Pleas to sustain the demurrer to the petition, the plaintiffs in error asked and were allowed a writ of error to this court. So far as the record shows the plaintiffs in error did not, either in the Supreme Court nor in the court below, elect in any way to stand on their petition. The record does not show that the court of Common Pleas of Wyandotte County has as yet entered an order sustaining the demurrer to the petition, or that any final judgment has been entered in the case as against the plaintiffs, or in favor of or against any of the defendants. No judgment sustaining the demurrer to the petition, or rendering any other judgment in the case, has been in fact made. The defendants in error contend that the judgment of the Supreme Court of Kansas, from which this appeal is taken, is not a final judgment such as will be reviewed on the writ of error by this court. It is conceded of course, that the judgment from which the defendants in error appealed to the Supreme Court of Kansas, by reason of their election to stand on their demurrer, was, for the purposes of their appeal, a final judgment. The judgment from which the plaintiffs in error have appealed is entirely different in its character; it determines only a question of pleading. The petition of the plaintiffs below is not dismissed, nor are any directions given by the Supreme

Court as to whether or not such petition shall be dismissed. The rights of the plaintiffs in error as against the defendants in error, Wyandotte Township and School District No. 9, have not been determined, and as to these defendants the plaintiffs in error are probably entitled to a perpetual injunction, enjoining them from collecting any tax on the lands in controversy. It is provided by Sec. 141 of Chapter 95, General Statutes of Kansas, of 1897, as follows:

"If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court, in its discretion, shall direct."

Under this statute, and the well settled practice in Kansas, the plaintiffs in error are entitled to amend their petition on the entry of the judgment in the court below sustaining the demurrer, and to set up new matter in their petition, to which the defendants in error would be required to plead, and after which a trial might be had as to issues of law or fact or both, before the entry of any final judgment. The right of a party to appeal to this court from an order sustaining or overruling a demurrer, has, we believe, been finally determined by this court in several cases.

In the case of the heirs of De Armas vs. United States, 6 Howd., 103, it was decided:

"An order of a district court sustaining a demurrer to a petition because it was multifarous, and because the

names of the persons claiming or in possession of the land which the petitioners allege to belong to them were not set forth, was not a final judgment or decree, from which an appeal lies to this court."

Mr. Chief Justice Taney, delivering the opinion of the court, among other things referring to the judgment appealed from, said:

"But evidently that judgment is not a final judgment or decree, for the petition is not dismissed, nor is the title of the petitioners to the land claimed by them finally adjudicated, nor their right to locate the same number of arpents upon the public domain. Nothing is decided but a question of pleading and a question as to proper parties. The petition appears to be still pending in the district court; and the objections upon which the court decided against the petitioners might be removed, if the appellants desire it, by an application to the court for leave to amend. But if the petitioners did not move for leave to amend, and preferred taking the opinion of this court upon the questions decided against them in the district court, then, under the opinion given by that court upon the demurrer, it should have proceeded to pass a final decree dismissing the bill. An appeal from that decree would have brought the case legally before this court, and authorized it to examine the grounds upon which the decree had been made. But as there is no final judgment or decree, we have no jurisdiction, and consequently the appeal must be dismissed."

The case of Meagher vs. The Minnesota Thresher Manufacturing Company, 145 U. S., 608; 12 S. Ct., 876, is a case in principle decisive of the case at bar. The decision in that case was as follows:

"The judgment of the State Supreme Court affirming an interlocutory order, overruling a demurrer with permission to plead further, is not an appealable final judgment, however decisive of the merits it may appear to be."

"Before an appeal can be prosecuted by any one or more of several defendants, the case should be determined as to all."

By the statute above referred to, the plaintiffs in error on the entry of the order sustaining the demurrer to their petition, were entitled to amend either with or without costs, as the court might direct.

In the recent case of Werner vs. Charleston, 151 U.S., 360; 14 S. Ct. R., 356, it was sought to review a judgment of the Supreme Court of the state of South Carolina, affirming a judgment overruling a demurrer. This court held:

"A judgment of a State Supreme Court affirming a judgment overruling a demurrer to a complaint for want of facts constituting a cause of action, is not an appealable final judgment."

In Rice vs. Sanger, 146 U. S., 197, 12 S. Ct. R., 664, it was held:

"A judgment of a State Supreme Court reversing and remanding a case for further proceedings, is not a final judgment, and will not be reviewed by the Supreme Court of the United States, especially after a second trial has been had below."

We ask that this appeal be dismissed for the reason that judgment appealed from is not a final judgment.

In Bostwick vs. Brinkerhoff, 106 U. S., 3; 1 Sup. Ct. Rep., 13, it is said:

"The rule is well settled and of long standing that a judgment or decree to be final within the meaning of that term, as used in the acts of Congress, giving this court jurisdiction on appeals and writs of error must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered."

See also Keystone Magnese & Iron Co. vs Martin, 10 S. Ct., 32; Chicago & N. W. Rly. Co. vs. Osborne, 146 U. S., 354; Brown vs. Baxter, 146 U. S., 619; Miners Bank vs. United States, 5 Howd., 215, and Tyler vs. Hand, 7 Howd., 537.

As far as the alleged conflict with the State Constitution is concerned, that question of course was illiminated from the case by the decision of the Kansas Supreme Court. So that the one question now left is whether the paragraph in the law of 1891 reading: "but nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation," vitiates the entire law by reason of making it in conflict with the Fourteenth amendment to the Federal Constitution forbidding a state to deny "to any person within its jurisdiction the equal protection of the laws," or to deprive him of his property without due process of law.

Plaintiffs in error claim that the classification made by the Kansas statute puts lands used for agricultural purposes and owned by individuals in one class and all other lands in another, permitting the latter class to be taken into a city and refusing to permit the former. This certainly is a forced and unfair construction of the law. The statute providing how certain lands can be incorporated within a city, says: "but nothing in this act shall be held to apply to any tract or tracts of land used for agricultural purposes" and then the clause is added: "when the same is now owned by any railroad or other corporation." The plain intent was to place land in two classes, those used for agricultural purposes and those not so used, and the last sentence quoted above is added by way of an exception from the class used for agricultural purposes, and was probably added as an amendment after the law had been prepared. If this last exception was stricken out all the objections urged against the law by plaintiff in error would virtually be removed.

The right of the legislature to classify the lands which are to be taken into the city and to say that certain classes of lands should be taken in, and that certain other classes should not, is not disputed. The only restriction is that the classification must be reasonable, not arbitrary, but based on some difference as stated by Mr. Justice Brewer in Rld. Co. vs. Ellis, 165 U. S., 65, which bears "a reasonable and just relation to the act in respect to which the classification is proposed." The classification in this case

of all lands used for agricultural purposes in one class and all other lands in another is not arbitrary, but on the contrary is certainly based on reasonable grounds. The benefits which accrue to lands within the limits of a city, are such that they would be of no value whatever, to lands used for agricultural purposes. Police protection, access thereto by means of graded and paved streets, the benefit of street lights or city water are of absolutely no value to lands used for agricultural purposes, while the increased tax which all these conveniences of modern city life necessitate, would be an almost insupportable burden to the owner of such lands.

It is urged that the same objection would obtain as to vacant lands, but practically this is not so. It is a matter of common knowledge that vacant lands situated with reference to large cities, as those which would be affected by the terms of the law of 1891, are chiefly valuable on account of their proximity to such a city, and the possibility or probability that they will become available as city property. The fact that such lands have the benefit of all these modern conveniences would enhance their value. In addition to this, from the standpoint of the City, vacant and unoccupied lands might become the rendezvous of tramps and vicious characters generally, and if situated within the limits of an incorporated city, and yet not a part of it, the police would be absolutely powerless to make arrests or in any way prevent the establishment of this nuisance in its very midst. There are as good reasons why lands on which manufacturing plants are situated, necessitating the

gathering together of large numbers of men and the construction of large buildings where fires can originate, demanding the assistance of the fire department maintained by the city, in order to put it out, if for no other reason, to prevent its spreading to the adjacent property in the city. This is peculiarly well illustrated by the facts in this case. The Union Pacific shops and switch yards filled with cars are in the heart of the city, and liable at any time to call on the city for fire protection, but paying no part of the expense of maintaining the city government and in no way subject to the city regulations for the proteotion against fire or the maintenance of order. These and many other reasons of a similar nature might have moved the legislature to have excepted agricultural lands and included vacant and all other classes of lands.

It is quite possible that some inequalities and hardships will result from this classification, but that would be so in any classification of which we could conceive. Justice McKenna in a very recent case, Magoun vs. Illinois Trust & Savings Bank, 170 U. S., 283, 18 Sup. Ct. Reporter, 598, says:

"There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And, necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

Is the classification as made by the Kansas Legislature, into lands used for agricultural purposes in one class and

all others in another, so unreasonable, so unjust and so arbitrary, that the court can say that the State of Kansas denies to any person the equal protection of the law? If the legislature had the right and has not offended against the fourteenth amendment by classifying lands used for agricultural purposes, in one class and those not so used in another, and denying cities of the first class the right to incorporate the former within their limits and granting the right to incorporate the latter, then the law of 1891, can stand providing the last clause excepting from the classification lands used for agricultural purposes, when owned by railroads or other corporations, is not so connected with and dependent on the rest of the law as a condition, consideration or compensation, that it can be held bad and the other provisions enforced.

The Supreme Court of Kansas held, at least by inference, that this clause from the law of 1891, quoted above might be objectionable, yet, the Union Pacific Railway Company, its lands not being used for agricultural purposes, was in no way affected by this objectionable part and was therefore not in a position to raise the question of its constitutionality. In other words, that the objectionable part might be rejected and the remainder of the law enforced. Whether this could be done, to a great extent, depends upon the legislative intent. To illustrate, if the excepting of lands used for agricultural purposes when owned by railroads or other corporations from the general class of agricultural lands, which cities of the first class are not

permitted to take into the city limits by said law of 1891 was largely instrumental in the passage of, and intimately associated with the entire act as an inducement therefor; then the law would have to stand or fall, as an entirety. But if said exception was merely incidental, if the legislative intent was to pass a law providing a better way for cities of the first class to incorporate adjacent territory within the city limits, and the exception was without special import, for instance, an amendment ingrafted in the law, by some statesman who considered his special work in life was "to down" railroads and other corporations, or by some friend of the Union Pacific Railway Company in the legislature, with a view to bringing the present suit, then the objectionable part could be disregarded without vitiating the entire law.

We have called attention to some events antecedent to the passage of the law of 1891, and of which the court may properly take judicial notice, and which we think may properly be considered as showing the why and wherefore of the passage of said law. A law somewhat similar to this had been a part of the laws of Kansas, relating to cities of the first class for years, and when the decision of the Supreme Court in Union Pacific Ry. Co. vs. Kansas City, supra, brought out its weak point, the legislature at its next session amended it. The law is general in its nature, and had for its purpose to afford an expeditious and effective way for a city of the first class to incorporate adjacent territory within the city limits.

Chief Justice Shaw in Warren vs. Charleston, 2 Gray, 84, quoted with approval by this court in the income tax cases, 158 U. S., 601, says the unconstitutional part of the law and the balance of a law in order to be void, must be "so mutually connected with and dependent on each other as conditions, considerations or compensations for each other as to warrant a belief that the legislature intended them as a whole and that if all could not be carried into effect, the legislature would not have passed the residue independently."

What "condition, consideration, or compensation," could there be between the residue of the law in question in this case and the taking in or leaving out of lands used for agricultural purposes and owned by railroad companies, or other corporations. The "conditions, considerations or compensations" between the different parts of a law referred to as prohibiting the sustaining of a part and rejection of the remainder is well illustrated in Slauson vs. City of Racine, 13 Wisconsin, 398, cited by plaintiff in error in their brief. Certain farming lands were attached to the city of Racine by act of the legislature and the constitutionality of the act was under consideration. It was claimed that part might be permitted to stand and part, virtually conceded to be void by reason of being in conflict with the constitution, rejected. The court held the contrary, quoting the rule laid down by Chief ustice Shaw, cited above and explained the reason why it applied in that case. The Court said:

"The first section of the act (Chap. 83, Pr. Laws, of 1856), provided that the tracts in question shall be annexed to the city. The second defines the new boundaries of the city, and then follows a proviso that the farming and agricultural lands annexed should be exempt from certain taxes, and should be taxed for city and ward purposes only at the rate of one-half of one per cent. There is no doubt that in many instances by the annexation of farming lands to a city, hardships are inflicted upon their owners by the increased rates of taxation to which they are subjected. If they are annexed, they must be taxed as other lands in the city, and that is a matter proper to be considered by the legislature in determining whether they shall be annexed. In this act it is evident the legislature had it under consideration, and that they annexed these lands with the idea that they might protect them against such hardships by a proviso for a less rate of taxation. The proviso was clearly intended as a compensation for the annexation and stronger language could not be well selected to show that the legislature intended the one to be subject to the condition stated in the other, and that they would not have annexed these lands unless they had supposed that effect could be given to the proviso. For these reasons we think the principle stated applies, and the act should be held inoperative."

The connection between the good and bad parts of the law in this Wisconsin case, is very apparent, but we fail to see any similar relationship between the parts of the act under consideration, and certainly the plaintiffs in error have failed to show any.

In Mesheimer vs. The State, 11 Ind., 482, also cited by the plaintiffs in error, the court say:

"The proposition that a statute may be good in part and in part void because unconstitutional, is not contro-

verted. It is established by numerous authorities. Commonwealth vs. Kimball, 24 Pic., 301; Fisher vs. McGuir, 1 Gray, 22; Armstrong vs. Jackson, 1 Blackft, 374; Clark vs. Ellis, 2 id., 8.) But it would seem that the provision of the statutes to be held constitutional should be substantially the same when considered by themselves, as when taken in connection with other parts of the statute held to be unconstitutional, or in other words, when that part of a statute which is unconstitutional so limits and qualifies the remaining portion that the latter when stripped of such unconstitutional provisions is essentially different in its effect and operation from what it would be were the whol law valid, it would seem that the whole law should fall."

Does the portion of the law of 1891, excepting lands used for agricultural purposes when owned by railroads and other corporations, so limit and qualify the remaining portion that the latter, if stripped of that provision, would be essentially different in its effect and operation from what it would be were the whole law valid? It would permit cities of the first class to exercise a power to which they have always had the right under the laws of Kansas. Its manner and mode of exercising said right would be the same, its effect would be the same on all except certain corporate entities, with respect to which they would not be permitted to exercise their power under such circumstances as it is claimed would deprive them of their property without due process of law or deny to them the equal protection of the law. This certainly cannot be held to be essentially different in its effect and operation.

Mr. Cooley, in his work on Constitutional Limitations, says:

"A statute, it has been said, is judicially held to be unconstitutional, because it is not within the scope of legislative authority; it may either propose to accomplish something prohitited by the constitution, or to accomplish some lawful, and even laudable object, by means repugnant to the Constitution, of the United States or of the state. A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional. Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last may fall. The point is not whether they are contained in the same section; for the distributions into sections is purely artificial; but whether they are essentially and inseperably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained."—Cooley's Constitutional Limitations, p. 210.

See also,

Rood vs. McCargar, 49 Cal., 117.
Robinson vs. Bidwell, 22 Cal., 379.
The People vs. Kenny, 96 N. Y., 294, 302.
State, ex rel. vs. Tuttle, 53 Wis., 45.
Donnersberger vs. Pendergast, 129 Ill., 229.

In all these cases it seems that when the purpose and intent of the law in question will be carried out without material modification by permitting the good parts to stand and rejecting the bad, this will be done. Modifications of the operation in minor details will not be considered sufficient to declare the entire law bad and thus defeat the enforcement of a wholesome and proper statute as it would in this case.

The Supreme Court of Kansas construing the statute of 1891 holds that portions of the act alleged (see page 6 of record) to be in conflict with the Constitution of the United States, is severable from the rest of the act. That the plaintiffs in error can not question the validity of the whole act because the case they present does not come within the terms of the one portion of the law, which they challenge in their petition and assignments of error as unconstitutional. The plaintiffs in error are complaining of the construction placed by the Supreme Court of Kansas on the law in this case. The construction so placed on the statute in question is final, and this court will not review or reverse it, even if it is not correct. The correctness of our contention is best shown by the decisions of this court in similar cases.

In the case of St. Paul, Minneapolis & Manitoba Rly. Co. vs. Todd County, 142 U. S., 282, it was held that a decision of a Supreme Court of a state, exempting the property of a railway company from taxation, but deciding that a certain class of property did not come within the terms of exemption, is not an impairment of the contract by the laws of the state, and is not subject to review in error in the Supreme Court of the United States.

In the opinion in this case by Mr. Chief Justice Fuller, it said: "It is conceded that the Supreme Court of Minnesota did not base its decision on the ground that there was not a valid contract between the state and the company, exempting its property from taxation, but held that the exemption claimed did not attach to these lands, and it is argued that if such lands are within the contract of exemption contained in the company's charter, then the obligation of that contract was impaired by the assessment under chapter 11 of the general laws of the state, and the decision of the Supreme Court holding that the lands were subject to assessments under such laws. Our jurisdiction cannot be maintained upon this view, as is stated by Mr. Justice Gray speaking for the court in New Orleans Water Works Company vs. Louisiana Sugar Refining Company, 125 U. S., 30.

"In order to come within the provisions of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of the contract be impaired,

but it must have been impaired by a law of the state, the prohibition is aimed at the legislative power of the state and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals, and the language of Mr. Justice Miller in exposition of the rule is quoted from two opinions of the court delivered by him."

" 'It must be the constitution or some law of the state which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States, and the decision of the state court must sustain the law in the matter in which the conflict is supposed to exist, or the case for this court does not arise.' "

In the case of Central Land Company vs. Laidley, 159 U. S., 103, it is decided that this court has no jurisdiction of a writ of error to a state court on the ground that the obligation of a contract has been impaired when the validity of the statute, under which the contract was made, is admitted, and the only question is of its construction by that court.

In this case Justice Gray, delivering the opinion of the court, said:

"The power delegated to us, is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary."

In Winona & St. Peter Land Company vs. Minnesota, 159 U. S., 526, in which the opinion was delivered by Justice Brewer, it was claimed that the provisions of Ch. 5 of the Laws of Minnesota of 1881, providing for the collection of back taxes, were void, the defendant complained of taxes

levied against its real estate, and argued that the provisions of the law in question, relative to the collection of unpaid taxes on personal property were void as being in conflict with the Constitution of the United States, and that the provision of the law relative to the collection of unpaid taxes on real property were also void. The Supreme Court of Minnesota held that the provision of the statute with reference to the real and personal property were separable, and that the provision of the statute, with reference to real property were valid, and could be enforced even though the provisions of the statute, with reference to personal property, were void. In the opinion it is said:

"The Supreme Court of the state was of the opinion that even if the tax on personal property was not collectable under the provisions of the tax law for the reason claimed, yet there was at least a valid tax which, in the absence of any law providing another method, might be enforced by an ordinary personal action. . . . ."

"It may well be that the legislature, in view of the probabilities of the changes in the title or situs of personal property, might deem it unwise to charge it with back taxes, while at the same time, by reason of the stationary character of real estate, it might elect to proceed against that. At any rate if it did so, it violates no provision of the federal constitution, and whether it did so or not was a matter to be determined finally by the Supreme Court of the state."

In Noble vs. Mitchell, 164 U. S., 367, the court had occasion to consider a statute of the State of Alabama regulating the subject of fire and marine insurance within the

state. The state court held that the provisions with reference to this subject were separable, and that construing the different laws of the state regulating the business of insurance by foreign corporations, and that so construed there was no conflict between the statute and the Constitution of the United States. In the opinion, on page 371, it is said:

"The action below was predicated upon the fact that the business of insurance had been done by foreign corporations, the Supreme Court of Alabama in interpreting the statute held the provision as to foreign corporations was distinct and separable from those concerning associations or partnerships. It said: 'It is contended, however, by Secs. 1207 of the code, supra, these provisions of the law are made to include associations and partnerships as well as corporations, and in this respect discriminates against citizens of any state who may compose such partnerships, and in this respect is violative of the constitutional provision which declares that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states.'

"We construe Sec. 1207 as amendatory of the sections to which it refers, so as to substitute the words corporations, associations or partnerships, for the words insurance company. Thus considered Sec. 1205, supra, would read as follows: any person who solicits insurance on behalf of the corporation or partnership not incorporated by the laws of this state, etc., and Sec. 1206, supra, would read: any person acting as agent for any foreign corporation, association or partnership which have, etc.'"

"By holding Sec. 1207 as amendatory of the other sections referred to in a manner declaring Secs. 1205 and 1206 are separable in their provisions, and so far as they are made to apply to and are enforced against foreign corporations, they do not contravene any provisions of the state

Constitution or the Constitution of the United States. This construction of the Alabama statute, although made by the Supreme Court of that state, it is urged is erroneous, and we are invited to disregard it but the interpretation of a statute of the state of Alabama by the Supreme Court thereof, under the circumstances here presented, is binding on us."

The first ground of the decision of the Supreme Court of Kansas does not involve any federal question.

"One claiming that a state statute is void for want of due process of law, is limited solely to the inquiry whether in the case presented by himself, the statute has operated to deprive him of his property without due process; and the court will not consider whether, in a different case, the act might so operate." Del Castillo vs. McConnico, 168 U. S., 674; 18 S. Ct., 229.

The first proposition of law decided by the Supreme Court of Kansas, as shown by the syllabus, is as follows:

"One cannot be heard to complain that a statute which discriminates between the classes of persons in the imposition of burdens of municipal control and taxation is unconstitutional as being a denial of the equal protection of the law, unless he belongs to one of the classes discriminated against."

The judgment is really based on this proposition: It was not necessary for the court to decide the question raised as to the constitutionality of the law. The decision on this proposition did not involve any federal question, and is therefore binding and conclusive on this court, and prevents a review of this case in this court.

The plaintiffs in error allege in their petition (page 5, record), that their lands are adjacent to the boundaries of the city; that certain portions of their lands (page 10, record) attempted to be included in the city under the ordinance, described on pages 5, 6, 7, 8 and 9 of the record, "are vacant and occupied lands held for railroad purposes, and that the balance of said lands (page 9, record) are used for railroad purposes; that a copy of the ordinance annexing the lands, the tax on which are in controversy (page 6, record), is attached to their petition. The preamble to the ordinance (page 14, record) is as follows:

"Whereas, a certain unplatted territory belonging to the Union Pacific Railroad Company lies upon and mainly within the City of Kansas City, Kansas, and is so situated as to be bounded on three-fourths (¾) of its boundary line by platted territory of, and adjoining to said city; which said railroad land, by virtue of its location, enjoys the benefits of said city without sharing its burdens."

The plaintiffs in error by these allegations show clearly that no part of the lands attempted to be included in the city under the ordinance were agricultural lands. Therefore, conceding for the purpose of argument only, that the whole of the exception found in the last part of section 15, and which reads as follows, "that nothing in this act shall be taken or held to be applied to any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation," means what the plaintiffs claim, and is void, the plaintiffs are not injured or affected by its invalidity.

Nothing in the act has been taken or held to apply to any tract or tracts of land used for agricultural purposes, when the same was owned by any railroad or other corporation. The portion of the law which the plaintiffs complain of has not been acted upon, and its validity is wholly immaterial in this case. If the lands annexed were agricultural lands owned by the plaintiffs, then a case would exist, where the validity of this part of the law would be material and the plaintiffs would be entitled to have its validity determined by the courts.

The right of the plaintiffs to present the question which they seek to do as to the validity of this part of the statute, must result from some injury done to them through these alleged illegal provisions.

The law on this point is clearly stated by Cooley in his work on Constitutional Limitations, 6 Edt., pages 196 and 197, in discussing the rules governing courts in declaring statutes unconstitutional, it is said:

"Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it."

"The statute is assumed to be valid, until some one complains whose right it invades. Prima facie, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void, as to him, his

property or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the legislature, therefore, concurs with well established principles of law in the conclusion that such an act is not void, but voidable only; and it follows, as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers. To this extent only it is necessary to go, in order to secure and protect the rights of all persons against the unwarranted exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interpose."

In Pittsburg, C., C. & St. L. Rly. Co. vs. Montgomery, 49 N. E., 582, it is decided:

"Where an act fixing the liability of all corporations except municipal is valid as to railroad corporations included therein, the question as to its validity with regard to other corporations cannot be raised by a railroad company."

The plaintiffs in error (pages 37, 38 and 39, brief) say that the discrimination in regard to agricultural lands does affect them. That their lands will be subject to the burdens of city taxation. The argument that the plaintiff's property will be subject to increased taxation was considered in Kelly vs. Pittsburg, 104 U. S., 17, and it was held:

"A state has power to determine what portion of her territory shall, for local purposes, be within the limits of a city and subject to its government, and to prescribe the rate of taxation at which such property shall be assessed."

"A party is not deprived of his property without due

process of law by the enforced collection of taxes, merely because they in individual cases work hardships or impose unequal burdens."

In Forsyth vs. Hammond, 166 U. S., 506, which was a proceeding to prevent the collection of taxes on certain land over which the city of Hammond had extended its territorial limits, it is held:

"The matter of the territorial boundaries of a municipal corporation is local in its nature, and as a rule is to be finally and absolutely determined by the authorities of the state."

The petition of the plaintiffs in error did not allege any tender of the taxes admitted to be due, and is for that reason demurrable.

"To give this court jurisdiction of a writ of error to a state court, it must appear affirmatively not only that a federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was decided adversely to the party claiming a right under the federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it." Eustis vs. Booles, 150 U. S., 362.

If the general demurrer filed to the petition can be sustained on any ground which does not involve the consideration of a federal question, this court will not review the decision of the Supreme Court of Kansas, as to the constitutionality of the law.

We contend that the petition is demurrable, for the reason that it does not contain any allegation of payment

or tender by the plaintiffs in error of taxes admitted by them to be lawfully due.

First—There is no allegation or tender of the taxes levied for state or county purposes. The correctness of the assessed valuation of the property is not disputed, and no complaint is made as to the rate of taxation for state or county purposes.

The petition should contain an allegation of the payment or tender of these taxes, and without it is fatally defective.

Second—The plaintiffs in error should have alleged a payment or tender of the city or township taxes due on their property. It was taxable whether in the city or out of it. The valuation and rate of taxation was fixed and the tax due on either theory, as to the validity of the ordinance easily computed. The plaintiffs in error should have, if their property was in the city, paid taxes on it according to the rate of taxation fixed by the city authorities, if it was in Wyandotte Township, they should have paid according to the rate of taxation fixed by the township officials. They were bound to know, as a matter of law, whether or not their land was in the city, and to act accordingly.

The plaintiffs cannot be allowed to escape payment of taxes for years by alleging that they do not know the location of their own lands with reference to the city limits, nor by alleging that there is a conflict between the municipal authorities as to which of them had jurisdiction to tax such lands.

This is especially true in this case where both the township and city authorities had levied a tax and an opportunity to pay, or at least to offer to pay on either basis of taxation, was presented.

Third—The petition shows that a portion of the lands included in the ordinance extending the city limits, was real estate owned by the Union Pacific Railway Company, and not used or necessary to be used in the daily operation of said railway, and therefore subject to assessment for taxation by the city or township authorities, and that another portion of the lands included in said ordinance was real estate assessable only by the State Board of Railway Commissioners.

The petition further shows that the State Board of Railway Commissioners assessed the lands assessable by them and included within the ordinance, as though the same were in the Township of Wyandotte.

The petition further shows (page 10, record) that the total assessed valuation of the road bed, right of way, and other property assessed and returned by the State Board of Railway Commissioners of Wyandotte Township, was $233,612.00, and that of this amount $110,968 was for lands included in the ordinance. Deducting the amount of assessed valuation alleged to have been so made for the lands included in the ordinance, from the total assessed valuation, and there remains an assessed valuation of $122,644.00, on which there would be due to Wyandotte Township $1,103.79, and to School District No. 9, $613.22, regardless

of the decision of the questions involved in this case. The petition contains no allegation of payment or tender of this portion of the tax, the validity of which is admitted by the petition.

Fourth—The plaintiffs in error allege the taxes levied by the defendant Wyandotte Township, and School District No. 9, on the land in controversy, not assessed by the Board of Railway Commissioners, were valid and that they were extended upon the tax rolls (page 11 of record), and that the county treasurer "proposes to and will collect the amounts of said city and school taxes levied against said property as aforesaid."

The allegation as to the levy, extension on the tax roll, and attempt to collect the tax levied by the school district, amounting to $686.10, is clear and positive. Should not the plaintiffs allege a payment or tender of this tax? They concede its validity; and allege the willingness of the treasurer to accept it.

The plaintiffs in error, as an excuse for not paying or offering to pay this tax, allege that of the $686.10 levied by the school district, $554.84 was tax on lands included in the ordinance extending the city limits. Conceding this contention to be correct, there would still be due to the school district on the property of the plaintiffs within the limits of said school district, and not included in the ordinance, a tax of $131.16. The petition does not show any payment or tender of this tax admitted to be due to the school district, regardless of the result of this suit. The

same situation existed in regard to the tax of Wyandotte Township. The total amount of the tax levied by the township according to the petition, was $2,102.44, and it is further alleged that of this amount $998.71 was tax on land included in the ordinance extending the city limits. It would follow that there would be due to the township on property not included in the ordinance, taxes amounting to $1,103.72.

There is no allegation of payment or tender of this tax of $1,103.72, also admitted to be due, regardless of the result of this suit.

The plaintiffs seek to escape liability for the payment of any taxes, and to avoid the necessity of alleging a payment or tender of any portion of their taxes, some of which are admitted to be valid and due, by alleging, first, that they do not know the location of their own lands, and, second, that there is a dispute as to which tax is legal. Under the laws of Kansas a person must pay all of his taxes, state, county and city, and cannot pay, nor can the county treasurer receive payment of any particular tax or taxes, leaving a portion of the total tax unpaid.

In Julien vs. Ainsworth, 27 Kan., 446, the plaintiff's total tax was $105.87. He disputed the validity of $19.03 of that amount levied to pay certain railroad bonds. He alleged in his petition a tender to the county treasurer of $86.87, the amount of his taxes less the railroad bond tax, and that the treasurer refused to receive said amount. Mr. Justice Brewer, delivering the opinion of the court, said:

"The question presented is whether a taxpayer can at his option tender to the county treasurer a part of the taxes assessed upon any specific property, and compel him to receive and receipt for such portion."

The law as declared in the syllabus of this case on this point is as follows:

"A taxpayer has no right to tender to a county treasurer a portion of his taxes, and compel a receipt therefor. The treasurer may decline to receive such part tendered, or to give any receipt, unless the entire amount of the tax is paid, or the taxpayer exercises the option given by Sec. 91 of the tax law, of paying one-half thereof before the 20th day of December."

The proper practice and pleading in cases of this character was also pointed out by Justice Brewer in the opinion of this case on page 449, it is said:

"If the plaintiff desires, as counsel say, to contest the validity of any particular tax or part thereof, his proper remedy is to tender the remaining taxes, as he did in this case, and then bring his action for an injunction, keeping good his tender, and showing wherein the taxes not tendered are illegal, and no proper charge upon his property. Then if his claim of illegality is sustained, an injunction will be ordered restraining the collection of such illegal tax, and the treasurer may then receipt for such taxes tendered and admitted to be legal. In no other way can proper protection be secured to the officer and the public."

In the recent case of Franz vs. Krebs, 41 Kans., 233, which was an action to enjoin the county clerk from issuing a tax deed on a tax sale certificate on property of the plaintiff, and which certificate was claimed to be illegal, because a part of the tax, for which the property was sold, was an

illegal special assessment, levied by the City of Atchison. The plaintiffs offered on the trial to make good the offer made in their petition as to the payment of the taxes conceded to be legal and due. The trial court found that the plaintiff failed to pay or tender the second half of her general taxes.

The Supreme Court of Kansas in its opinion delivered by Chief Justice Horton, said:

"It is conceded that all the taxes levied upon the real estate for which it was sold, were legal, except the special macadam tax. It has been frequently decided by this court that an action will not lie to set aside a tax-sale certificate or restrain a tax proceeding, without a prior payment, or tender, of all the legal taxes admitted to be due and payable. In this case the amount of legal taxes are not in dispute, and therefore the rules applicable to other cases generally will be applied to this."

"Evidently the plaintiff was guilty of laches, in failing to pay or tender the second half of her general taxes admitted to be legal and due."

In Hagaman vs. Comm'rs. of Cloud Co., 19 Kan., 394, which was an action to enjoin the assignment of tax sale certificates, it is decided:

"Equity will not as a rule interfere to restrain by injunction the assignment of tax-sale certificates on real estate, where the property is subject to taxation, on the ground of irregularities in the assessment and the levy of the taxes and the proceedings of the sale, unless the party seeking equitable relief shall first pay or tender the taxes which are admitted to be due, or just, or which the court finds from the evidence ought to be paid."

In the opinion of this case, delivered by Chief Justice Horton, the law on this question as declared by this court is quoted and approved. It is said:

"No evidence was offered that the taxes were wholly illegal and void; neither was it alleged in the petition, nor proven on the trial, that the plaintiff had paid or tendered any part of the taxes. The defendants demurred to the evidence of the plaintiff. The court sustained the demurrer; and we are asked to reverse such ruling."

"Upon familiar principles, and by the repeated decisions of this court, the plaintiff is not rightly entitled to the relief demanded until he has done that justice, or offered to do it, which he exacts from others. He who seeks equity, must do equity. The action of the court in sustaining the demurrer was correct"

The recent case of Albuquerque vs. Perea, 147 U. S., 87; 13 S. Ct. R., 194, is decisive as to the effect of the allegations of the plaintiff's petition by which they seek to avoid the necessity of alleging a tender of the taxes admitted to be due. This case is in principle identical with this. Mr. Justice Brewer, declaring the opinion of the court, quotes from the petition of the plaintiffs the following, which is very similar to the allegations of the petition in this case:

"That the amount of its taxes upon the assessment as made by the board of equalization is the sum of $2,189, and that the amount of the assessment which your orator should justly pay for its said property, if lawfully, equitably, and justly assessed, would be the sum of $1,532.30, which said sum your orator brings into court, and hereby tenders."

"And your orator further alleges that the said assess-

ment and said tax roll are so made out that it is impossible to separate the property upon which your orator is justly and lawfully taxed, and the taxes upon which are justly and lawfully levied, from the balance of the taxes assessed against your orator; but whatever sum may be ascertained by the court to be justly due from your orator on account of taxes for the year 1889 your orator is ready and willing to bring the same into court and is ready to pay the same."

The defendants demurred to the bill in this case, and their demurrer was sustained, and the bill dismissed, and this decision was affirmed by the Supreme Court of the Territory of New Mexico, and from this decision an appeal was taken. In the opinion, Justice Brewer, having stated the facts of the case, among other things, said:

"With respect to the taxes of 1889, there was no payment or tender of payment of any amount. Plaintiff seeks to avoid the necessity therefor by alleging that it is impossible to separate the legal from the illegal portions of the taxes—an allegation which is manifestly untrue—in view of the fact that it had no difficulty in making the separation in the taxes of 1888, the assessment for which was made in a similar way, and in view of tthe further fact that it must have known what property it had which was subject to taxation as well as its value, and therefore the rate of taxation being fixed by law, it could, of course, have known what amount was undoubtedly due. The rule in respect to this matter is perfectly well settled in this court. In State Railroad Tax Cases, 92, U. S., 575, 616, it was fully considered. In that case it was said by Mr. Justice Miller, speaking for the court: 'It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the tax should

be permanently enjoined, submit to pay the balance. This is not equity. It is a direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest, by lumping that with which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full of all the taxes assessed.' "

The case of the Northern Pacific Railway Company vs. Clark, 153 U. S., 252, 14 S. Ct. Rep., was a suit by the Northern Pacific Railway Company to enjoin the collection of taxes alleged to be illegally assessed against its lands. The circuit court sustained a demurrer to the bill and dismissed it for want of equity. In this case the bill showed that the railway company was liable to pay taxes either on a percentage of its gross earnings or to pay a tax upon its land as other property of like character was assessed. The bill did not allege a tender of taxes on either basis of taxation. Mr. Justice Jackson, delivering an opinion of the court, said:

"Being liable to pay either a percentage on gross earnings in accordance with the provisions of the act of 1889, or a tax upon its land as other property of like character was assessed, the appellant was not entitled to any relief in a court of equity by injunction without payment or tender of what was due under one or the other of these modes of taxation.'

If a judgment is correct it will not be reversed on appeal, even if the court below based it on incorrect reasons. The petition of the plaintiff being demurrable for want of any allegation of tender or payment of the taxes admitted to be valid, and the question thereby presented not being a federal question this appeal should be dismissed.

For the reasons given we respectfully submit that the appeal should be dismissed or that the decision of the Supreme Court of Kansas should be affirmed.

T. A. POLLOCK and
F. D. HUTCHINGS,
Attys. for Defts. in Error.

No. 402.

Motion to advance.

Filed Sept. 16, 1898.

Office Supreme Court U. S.
FILED
SEP 16 1898
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1898.

No. 402.

"EXHIBIT A."

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. DOANE, AS RECEIVERS OF THE UNION PACIFIC RAILWAY COMPANY, APPELLANTS,

vs.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF EDUCATION OF THE CITY OF KANSAS CITY, KANSAS; THE TOWNSHIP OF WYANDOTTE COUNTY, KANSAS; SCHOOL DISTRICT No. 9 OF WYANDOTTE COUNTY, KANSAS; BENJAMIN SCHNIERLE, AS COUNTY TREASURER OF WYANDOTTE COUNTY, KANSAS; LEONARD C. DANIELS, AS SUCCESSOR IN OFFICE OF CHARLES E. BRUCE, AS COUNTY CLERK OF WYANDOTTE COUNTY, KANSAS, RESPONDENTS.

MOTION TO ADVANCE.

Come now The City of Kansas City, Kansas; The Board of Education of the City of Kansas City, Kansas; Benjamin Schnierle, as county treasurer of Wyandotte county,

Kansas, and Leonard C. Daniels, as successor in office of Charles E. Bruce, as county clerk of Wyandotte county, Kansas, respondents in the above-entitled action, and represent and show to the court that said action involves the validity and collection of certain taxes assessed and levied by the city of Kansas City, Kansas, and the board of education of the city of Kansas City, Kansas, for the years 1893 and subsequent thereto against the lands and property of the Union Pacific Railway Company situate in Wyandotte county, Kansas.

That said lands of said railway company in said Wyandotte county, Kansas, prior to March 11th, 1892, were not within the corporate limits of said city, but that on said last-mentioned date said lands were, by ordinance, taken into the corporate limits of said city, pursuant to an act of the legislature of the State of Kansas, the same being chapter 74 of the Session Laws of Kansas for 1891, authorizing and empowering said city so to do, and the said lands thereby became subject to taxation by said city for city purposes; but that said appellants claim that said city has no power or authority over it in the premises, because they say that said statute of the State of Kansas and the ordinance of said city enacted pursuant thereto, before mentioned, are in violation of the fourteenth amendment of the Federal Constitution and of section 1 of article 12 and of section 17 of article 2 of the constitution of the State of Kansas.

Said respondents further represent and show to the court that the appellants were, on or about the 13th day of October, 1893, by the United States circuit courts for the districts of Kansas and Nebraska, respectively appointed receivers of all the property of the Union Pacific Railway Company within said States in the Union Pacific mortgage foreclosure proceedings, in which proceedings the United States is an interested party.

That said foreclosure proceedings are about to be terminated, and that said appellants have been ordered by said

court to make their final reports and to be discharged as such receivers, the reports to be filed and such discharge to take effect about January —, 1899.

These respondents therefore move the honorable court that inasmuch as a public interest, not only to the United States, but to the city of Kansas City, Kansas, is involved in this action that said cause be advanced upon the calendar for hearing and be assigned therefor for as early a date as is practicable in the premises.

SILAS PORTER,
T. A. POLLOCK, and
GEO. B. WATSON,
Attorneys for Respondents.

IN THE SUPREME COURT OF THE UNITED STATES.

S. H. H. CLARK, OLIVER W. MINK, E. ELLERY ANDERSON, J. W. DOANE, *as Receivers of the Union Pacific Railway Company, Appellants,*

vs.

THE CITY OF KANSAS CITY, KANSAS; THE BOARD OF EDUCATION OF THE CITY OF KANSAS CITY, KANSAS; THE TOWNSHIP OF WYANDOTTE COUNTY, KANSAS; SCHOOL DISTRICT NO. 9 OF WYANDOTTE COUNTY, KANSAS; BENJAMIN SCHNIERLE, *as County Treasurer of Wyandotte County, Kansas;* LEONARD C. DANIELS, *as Successor in Office of Charles E. Bruce, as County Clerk of Wyandotte County, Kansas, Respondents.*

NOTICE.

To the appellants in the above-entitled action and to A. L. Williams, N. H. Loomis, and R. W. Blair, their attorneys of record:

You and each of you are hereby notified that The City of Kansas City, Kansas; The Board of Education of the City

of Kansas City, Kansas; Benjamin Schnierle, as county treasurer of Wyandotte county, Kansas, and Leonard C. Daniels, as successor in office of Charles E. Bruce, as county clerk of Wyandotte county, Kansas, respondents in the above-entitled action, have filed their certain motion in the Supreme Court of the United States for the advancement of said cause, a copy of which motion is hereto attached, marked Exhibit "A," and that said motion will come on for hearing before said court, at Washington, D. C., on October 10th, 1898, or as soon thereafter as counsel can be heard in the premises.

SILAS PORTER,
T. A. POLLOCK, and
GEO. B. WATSON,
Attorneys for Respondents.

Service of copies of the foregoing motion and notice is hereby acknowledged this 9th day of September, A. D. 1898.

A. L. WILLIAMS and
N. H. LOOMIS,
Att'ys for S. H. H. Clark et al., Receivers Union Pacific R'y Co.

[Endorsed:] Oct. 11. Case No. 16,987. Supreme Court U. S., October term, 1898. Term No., 402. S. H. H. Clark *et al.*, receivers, &c., P. E., *vs.* The City of Kansas City, Kansas, *et al.* Motion to advance, notice, & proof of service. Office Supreme Court U. S. Filed Sep. 16, 1898. James H. McKenney, clerk.

CLARK *v.* KANSAS CITY.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 402. Argued December 13, 1898. — Decided January 3, 1899.

As the laws of Kansas permit an amendment of the plaintiffs' pleadings in the court below after the overruling by the Supreme Court of a demurrer to them, and as the Supreme Court of the State, in deciding this case, did not take that right away, it follows that the judgment of the state court was not final, and that this case must be dismissed for want of jurisdiction.

THE case is stated in the opinion.

Mr. A. L. Williams for plaintiffs in error. *Mr. Winslow S. Pierce* and *Mr. N. H. Loomis* were with him on the brief.

Mr. F. D. Hutchings and *Mr. Thomas A. Pollock* for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Kansas to review a judgment of that court overruling a demurrer of the *nisi prius* court to the petition of plaintiffs in error for an injunction to restrain the collection of taxes, levied by the city of Kansas City, on lands brought into that city under the act of the legislature of Kansas authorizing cities of the first class having a population of 30,000 or more, which shall be subdivided into lots and blocks, or whenever any unplatted tract of land shall lie upon or mainly within any such

city, or is so situated as to be bounded on three fourths of its boundary line by platted territory of or adjacent to such city, or by the boundary line of such city, or by both, the same may be added to and made part of the city by ordinance duly passed. There was a provision in the law as follows: "But nothing in this act shall be taken or held to apply to any tract or tracts of land used for agricultural purposes when the same is not owned by any railroad or other corporation."

An ordinance was passed, pursuant to the statute, extending the city boundaries so as to include large tracts of land belonging to the Union Pacific Railway. A portion of the lands was used for right of way and other railroad purposes, and a large part of them was vacant and unoccupied, which was held by the company for its future uses.

Taxes were levied by the city upon the property, and this suit was brought to enjoin their collection. The petition presented the facts, and contained the following allegation:

"Nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction equal protection of the laws."

"And plaintiffs are advised, and so charge the fact to be, that in so far as said statute attempts to authorize the taking of said lands within the limits of Kansas City, Kansas, as attempted in said ordinance, Exhibit 'A,' it is unconstitutional, null and void, in this, to wit:

"That by reason of that portion of the act which excepts from its operation any tract or tracts of land used for agricultural purposes, when the same is not owned by any railroad or other corporation, it is in violation of that part of the Fourteenth Amendment to the Constitution of the United States, which reads as follows: 'Nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

The defendants, other than the township of Wyandotte and school district No. 9, filed a general demurrer to the petition, which was overruled. The defendants, the township of Wyandotte and school district No. 9, did not plead in any way.

The demurring defendants electing to stand upon their demurrer, a perpetual injunction was granted as prayed for against them. They appealed to the Supreme Court, where the judgment of the lower court was reversed, and an order was made directing that court to sustain the demurrer.

The question of the constitutionality of the statute was presented to the Supreme Court of Kansas, and that court held that it violated neither the Federal or state constitutions. The same question is presented here in six assignments of errors. The specific contention is that the Kansas statute violates that portion of the Fourteenth Amendment which provides: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The defendants in error, however, object to the jurisdiction of this court, and urge that the judgment appealed from is not a final one, and is not therefore reviewable in this court.

It is further urged that the record does not show that anything was done in the lower court after decision in the Supreme Court, but that error is prosecuted directly to the judgment of the Supreme Court, and that that determined only a question of pleading, and that its direction has not yet been acted on, and that no judgment of any kind has been entered against Wyandotte township or school district No. 9.

The law of Kansas prescribing action on demurrer is as follows: "If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court, in its discretion, shall direct."

In *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, it was decided that "the rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term, as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had

already rendered." For the support of which many cases were cited, and further: "If the judgment is not one which disposes of the whole case on its merits, it is not final. Consequently, it has been uniformly held that a judgment of reversal, with leave for further proceedings in the court below, cannot be brought here on writ of error." Also citing cases.

This case and those it cites have been applied many times, but we will confine our notice to instances of demurrer. *De Armas* v. *United States*, 6 How. 103, was of this kind, but the grounds of demurrer urged there made the rule when applied to them not very disputable, and the case is not of much aid.

In *Meagher* v. *Minnesota Thresher Mfg. Co.*, 145 U. S. 608, the demurrer was overruled with leave to answer over. Upon appeal to the Supreme Court the order overruling the demurrer was affirmed with costs. The rule of the Supreme Court provided that "upon the reversal, affirmance or modification of any order or judgment of the District Court by this court, there will be a *remittitur* to the District Court, unless otherwise ordered." Held, that the plaintiffs in error upon the return of the case to the court could plead over, and hence judgment was not final.

In *Werner* v. *Charleston*, 151 U. S. 360, the announcement by the Chief Justice was: "The writ of error is dismissed. *Meagher* v. *Minnesota Thresher Mfg. Co.*, 145 U. S. 608; *Rice* v. *Sanger*, 144 U. S. 197; *Hume* v. *Bowie*, 148 U. S. 245."

The statement of the case shows that it was analogous to the case at bar. The motion to dismiss stated that —

"The judgment brought here by writ of error for review is a judgment of the Supreme Court of the State of South Carolina, which simply affirmed a decision of the lower court overruling a demurrer, and thereby remanded the case to the court below for a hearing on the merits. It is, therefore, an interlocutory judgment, and is in no sense a final decree.

"To this the plaintiff in error replied: 'The judgment brought here by writ of error for review is the judgment of the Supreme Court of the State of South Carolina, holding that a certain act of the general assembly of the State of South Carolina, entitled, "An act to authorize the city coun-

cil of Charleston to fill up low lots and grounds in the city of Charleston in certain cases and for other purposes," approved on the 18th of December, 1830, is not in violation of the Constitution of the United States, thereby affirming the judgment of the trial court and so ending the constitutional defence interposed by the plaintiff in error.'

"An examination of the record will show that the main ground of the demurrer, interposed in the court below by the plaintiff in error, was the unconstitutionality of the act of 1830. It was claimed both there and in the court above, as well as in this court, to be in violation of due process of law." *Rice* v. *Sanger* and *Hume* v. *Bowie*, cited by the Chief Justice, were not rulings on demurrer, and we have confined our notice to cases of that kind, not because they are separable in principle from the other cases decided, but to observe and explain the rule in its special application. That rule is in its utmost generality that no judgment is final which does not terminate the litigation between the parties to the suit. If anything substantial remain to be done to this end, the judgment is not final. The law of the case upon the pleadings, and hence as presented by the demurrer, may be settled, but if power remain to make a new case, either by the direction of the Supreme Court or in the absence of such direction by the statutes of the State, the judgment is not final.

The statute of Kansas permitted such amendment, and the order of the Supreme Court did not take it away. Its order proceeds no further than a direction to sustain the demurrer to the petition. That done, the lower court had and has all of its power under the statute, and may exercise it at the invocation of plaintiffs in error. What they may be advised to do we cannot know. We can only consider their right and the power of the court. These existing, if we should affirm the judgment of the Supreme Court, that court, and maybe this court, may be called upon to determine other issues between the parties.

It follows from these views that the judgment of the Supreme Court is not final, and the writ of error must be dismissed; and it is so ordered.